(26,300)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 833.

ROBERT COX, APPELLANT,

vs.

MAJOR GENERAL LEONARD WOOD, COMMANDANT OF CAMP FUNSTON, IN THE STATE OF KANSAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEBRUARY 6, 1918.

1 In the District Court of the United States, District of Kansas, First Division.

No. 1880.

In the Matter of the Application of ROBERT COX for a Writ of Habeas Corpus.

United States of America to Major General Leonard Wood, Commandant of Camp Funston, in the State of Kansas, and Fred Robertson, United States Attorney for the District of Kansas:

You and each of you are cited and admonished to be and appear at the Supreme Court of the United States, to be held in the city of Washington, District of Columbia, within thirty days from the date hereof, pursuant to an order allowing an appeal filed and entered in the Clerk's Office of the District Court of the United States for the District of Kansas, from a final order, signed, filed and entered on the 4th day of January, A. D. 1918, in that certain cause (the same being an application for a writ of Habeas Corpus), No. 1880, wherein Robert Cox is petitioner and you are defendants and appellees, to show cause if any there be, why the order refusing and denying issuance of the writ of Habeas Corpus applied for, rendered against the said appellant, as in said order allowing appeal mentioned, should not be corrected, and why justice should not be done to said petitioner and appellant in that behalf.

Witness the Honorable John C. Pollock, United States District Judge for the District of Kansas, this 11th day of January, A. D. 1918, and of the Independence of the United States of America the one hundred and forty-third year.

JOHN C. POLLOCK,
United States District Judge for the District of Kansas.

2 *Acknowledgement of Service on Citation.*

Service of the within Citation acknowledged this 11th day of January, 1918.

FRED ROBERTSON,
U. S. Attorney,
For Major General Leonard Wood.

Service of the within citation acknowledged this — day of January, 1918.

———.

[Endorsed:] No. 1880. In re Robert Cox, Habeas Corpus, Citation. Filed January 12th, 1918. Morton Albaugh, Clerk.

1—833

3 *Petition for Writ of Habeas Corpus.*

UNITED STATES OF AMERICA:

In the District Court of the United States for the District of Kansas.

In the Matter of Robert Cox, of Richmond, Ray County, Missouri, unlawfully detained and restrained of his liberty at Camp Funston, in the Counties of Geary and Riley, in the State of Kansas, by General Leonard Wood, the military commander thereof, the said Robert Cox, being a member of the National Militia conscripted under the Conscription Act of May 18, 1917, and unlawfully restrained of his liberty under said Act.

Your petitioner, Robert Cox, humbly petitioning showeth unto the court as follows:

1. That your petitioner, having been born in the State of Missouri on the 31st day of August, 1895, is a citizen of the United States, and as such is subject to the operation of the Conscription Act of May 18, 1917, passed as he is informed and believes, under that part of Sec. 8, Art. I of the Constitution of the United States which provides that "the Congress shall have power * * * to provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasions." As a patriotic citizen, devoted to the Constitution and laws of his country, your petitioner, who has been duly conscripted under said Act, is not only ready but willing to serve, as a member of said National Militia, for any one or all of the three purposes which the Constitution specifies.

2. That your petitioner further avers that he is advised and believes, and so charges, that he cannot be lawfully called upon to serve for any other purpose; that he cannot be lawfully called upon as one conscripted under said act to render military service beyond the territorial limits of the United States.

4 Your petitioner further avers that he is informed and believes, and so charges, that the Congress, in enacting said legislation under which he has been drafted and confined in said Camp Funston, has not attempted to authorize, directly or indirectly, the transportation of said draft- National Militia "across the seas"; neither has it manifested any consciousness, by any positive utterance, that such an unprecedented act would be attempted by anyone. Petitioner avers that, in what is known as his Flag Day address of June 14, 1917, the President of the United States solemnly and truthfully declared that "American armies were never before sent across the seas."

3. That it is the undoubted constitutional right and immunity of your petitioner to be exempt, as a member of said conscripted National Militia, from military service beyond the territorial limits of the United States, because, as he is informed and believes, and so charges, *that* such constitutional right and immunity solemnly de-

fined in Sec. 8 Art. I of the Constitution was recognized and affirmed by the Supreme Court of the United States in 1827; by Attorney General Wickersham in an official opinion, dated Feb. 17, 1912; and by President Wilson in fo-r speeches delivered in January and February, 1916.

4. That despite such express constitutional right and immunity from service abroad, your petitioner, together with thousands of other citizens of the United States, has been compelled to leave his home, and is now confined against his will by the military power of the United States for the express, declared and unlawful purpose of being transported to the battlefields of Europe in open defiance of the Constitution of the United States. As early as July 16, 1917, (See Congressional Record of July 20, 1917, pp. 5864-5) the Secretary of War made a formal declaration of the fact that not only the State Militia (now called the National Guard), but also the National Militia (now called the National Army), were to be sent to France, with all convenient speed. Among other things the Secretary of War then said: "It is intended to send the National Guard, or such units thereof as are properly equipped and trained, to join the American expeditionary force in France before the additional forces authorized by the act above, now called the National Army, can be sent. When the plans for mobilizing these two forces were drawn it was not known how soon the national Army could be assembled under the draft." Your petitioner avers that since that date the conscripted National Militia (now called the National Army in order to conceal its real character) has been duly drafted, and is now being concentrated in camps to be therein detained for a few months prior to its transportation to the battlefields of Europe, under purely executive orders, to be made in open defiance of the Constitution of the United States. Your petitioner further avers that neither the American electorate nor the American Congress has ever spoken one word indicating the desire of either that the National Militia should be sent to the battlefields of Europe. Neither the electorate nor the Congress has authorized the Executive power to make any such order or orders, expressly forbidden by the Constitution of the United States.

5. That your petitioner is now unlawfully detained and restrained of his liberty at Camp Funston by the military power of the United States, because *is he* so detained and restrained for the sole, only and declared purpose of being transported very soon to the battlefields of Europe, under void executive orders to be made by the Secretary of War in open defiance of the Constitution of the United States. That petitioner will surely be so transported unless he is delivered by the order of this Honorable Court from such unlawful custody. Your petitioner further avers that as the military Commander of said Camp Funston is now General Leeonard Wood, your petitioner is now detained by General Leonard Wood, and restrained by him in the manner above set forth.

Wherefore, in consideration of the premises, your petitioner prays that a writ of Habeas Corpus may be granted and issued forth-

6 with to the said General Leonard Wood, directing him to bring and have the body of your petitioner before this Honorable Court, or any Judge thereof, at a time and place, in said writ to be specified to do and receive what shall then and there be considered by the Court concerning your petitioner and concerning the time and cause of the detention of your petitioner, and concerning the said writ, and that your petitioner may be restored to his liberty. And for such other and further relief as the nature of this petition may require.

ROBERT COX, *Petitioner.*

HANNIS TAYLOR,
JOSEPH E. BLACK,
Attorneys for Petitioner.

STATE OF KANSAS,
County of Riley, ss:

Robert Cox, being duly sworn deposes and says that he is the petitioner named in the foregoing petition and that he has read the same; that the matters and things therein alleged are true, except as to such matters and things therein stated to be alleged on information and belief, and that, as — such, he believes them to be true.

ROBERT COX.

Subscribed and sworn to before me this 2nd day of November, 1917.

[SEAL.] T. W. SCOTT,
Notary Public.

My term will expire 3/22-1921.

Endorsed: #1880. In the District Court of the United States for the District of Kansas. Petition for writ of Habeas corpus in behalf of Robert Cox. Filed Dec. 3, 1917. Morton Albaugh, Clerk. Hannis Taylor Joseph E. Black, Attorneys for Petitioner.

7 In the District Court of the United States, District of Kansas, First Division.

In the Matter of Application of ROBERT COX for Writ of Habeas Corpus.

Motion to Dismiss.

Comes now the respondent, Major-General Leonard Wood, military commander of Camp Funston, and moves the court to dismiss the application herein for the reasons, to-wit:

First. That said application does not state facts sufficient to give the court jurisdiction, power, or authority to grant the writ of habeas corpus prayed for.

Second. The petition for the writ shows on its face that if the

writ be granted, on the return of the same said writ would be discharged and petitioner remanded to the custody of your respondent.

Wherefore, respondent prays the petitioner's application be dismissed and the writ denied.

MAJOR-GENERAL LEONARD WOOD,
Commandant, Camp Funston,

By FRED ROBERTSON,
United States Attorney for the District of Kansas.

Endorsed: No. 1880. In the District Court of the United States, District of Kansas, First Division. In the Matter of Application of Robert Cox for writ of Habeas Corpus. Motion to Dismiss. Filed Dec. 15, 1917. Morton Albaugh, Clerk.

8 In the District Court of the United States, District of Kansas, First Division.

In the Matter of the Application of ROBERT COX for Writ of Habeas Corpus.

Order.

Now on this twentieth day of December, 1917, this matter comes on for hearing on the motion of respondent to dismiss the application of petitioner for writ of habeas corpus, the petitioner being present by his attorney, Joseph E. Black, and the respondent being present by Fred Robertson, United States Attorney for the District of Kansas; whereupon, and upon agreement of parties, the cause is submitted and taken under advisement by the court upon said application and motion, the respondent filing a brief at the time of submission, and both parties to file any further and additional briefs within ten days from this date.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 1880. In the District Court of the United States, District of Kansas, First Division. In the Matter of Application of Robert Cox for Writ of Habeas Corpus. Order of submission. Filed Dec. 20, 1917. Morton Albaugh, Clerk.

9 In the District Court of the United States, District of Kansas, First Division.

In the Matter of the Application of ROBERT COX for Writ of Habeas Corpus.

Final Order of Dismissal.

This matter was submitted on the 20th day of December, 1917, for hearing on the motion to quash presented by respondent and

praying the court to dismiss the petition of said Cox for a writ of Habeas Corpus. Said "motion to quash," equivalent in law to a demurrer to said petition, admits the following facts stated therein:

1. That petitioner has been duly conscripted under the Conscription Act of May 18, 1917.

2. That "as a patriotic citizen, devoted to the Constitution and laws of his country, your petitioner, who has been duly conscripted under said Act, is not only ready but willing to serve as a member of said National Militia for any one or all of the three purposes which the Constitution specifies."

3. That "in what is known as his Flag Day address, the President of the United States solemnly and truthfully declared that "American armies were never before sent across the seas."

4. That "your petitioner, together with thousands of other citizens of the United States, has been compelled to leave his home, and is now confined against his will by the military power of the United States, for the express, declared * * * purpose of being transported to the battlefields of Europe. * * * As early as June 16, 1917 (See Congressional Record of July 20, 1917, pp. 5864-5), the Secretary of War made a formal declaration of the fact that not only the State Militia (now called the National Guard) but also the National Militia (now called the National Army) were to be sent to France with all convenient speed. * * * That your petitioner will surely be so transported unless he is delivered by the order of this Honorable Court."

Upon the foregoing state of facts, appearing upon the face of said petition and admitted by said motion to quash, petitioner, after affirming the validity of said Conscription Act of May 18, 1917, pleads what he calls his constitutional immunity from military service beyond the territorial limits of the United States. Such claim of constitutional immunity rests upon the contention that no conscription act can be passed except under that part of Sec. 8, Art. 1 of the Constitution, which provides that "The Congress shall have power * * * to provide for calling forth the militia to execute the laws of the Union, surpress insurrections and repel invasions,"—a provision which, as construed by the Supreme Court of the United States and by Attorney General Wickersham on Feb. 17, 1912, expressly forbids as petitioner contends the employment of any part of said militia so called forth beyond the territorial limits of the United States.

Knowing as the court does that it is the purpose of this proceeding to bring before the Supreme Court of the United States, as speedily as possible and upon a direct appeal, this grave and far-reaching constitutional question, it has resolved, in order to facilitate that result, to sustain said motion to quash and to dismiss said petition of Robert Cox for a writ of habeas corpus upon the facts stated therein, and to that end this final order of dismissal is made. To which order of the court in sustaining the motion to dismiss and to the order of the court dismissing the petition for the writ, and to the order of court made denying the writ prayed and each and all of said orders and to the making of the order made by the court

herein, petitioner in open court excepted and excepts and prays his exceptions be allowed of record which is done accordingly.

Done this Jany. 4th, 1918, at Kansas City, Kansas.

JOHN C. POLLOCK, *Judge.*

11 Endorsed: No. 1880. In the Matter of Robert Cox for Writ of Habeas Corpus. Final Order of Dismissal. Filed Jany. 4, 1918. Morton Albaugh, Clerk.

12 *Petition for Appeal.*

In the District Court of the United States for the District of Kansas.

UNITED STATES OF AMERICA:

In the Matter of ROBERT COX, Ray Co., Missouri, unlawfully detained and restrained of his liberty at Camp Funston, in the counties of Geary and Riley, in the State of Kansas, by General Leonard Wood, the Military Commander thereof, the said Robert Cox being a member of the National Militia conscripted under the Conscription Act of May 18, 1917, and unlawfully restrained of his liberty under said Act.

Petition for Appeal.

The above named Robert Cox, Petitioner in the above entitled matter, feeling himself aggrieved by the final judgment heretofore made and entered by this Court in this cause on the 4th day of January A. D. 1918, whereby it was ordered and adjudged that the application of the said petitioner for a writ of Habeas Corpus be denied and his said petition be dismissed, comes now by his Attorneys and petitions this Court for an order allowing him, the said petitioner to prosecute an appeal from said final judgment to the Supreme Court of the United States under and according to the laws of the United States in that behalf made and provided, and also that an order may be made fixing the amount of the security which the said petitioner shall give and furnish upon such appeal, and also that all further proceedings in this matter in this Court be superceded and stayed, and that the present custody of said petitioner be not disturbed, pending said appeal and until the final termination of said appeal by said Supreme Court of the United States.

And your petitioner will ever pray.

HANNIS F. TAYLOR,
JOSEPH E. BLACK,
Attorneys for Petitioner.

Endorsed: No. 1880. In the Matter of Robert Cox for writ of Habeas Corpus. Petition for Appeal. Filed Jany. 4, 1918. Morton Albaugh, Clerk.

13 *Order Granting Appeal.*

UNITED STATES OF AMERICA:

In the District Court of the United States for the District of Kansas.

In the Matter of ROBERT COX, Ray Co., Missouri, unlawfully detained and restrained of his liberty at Camp Funston, in the counties of Geary and Riley, in the State of Kansas, by General Leonard Wood, the military commander thereof, the said Robert Cox being a member of the National Militia conscripted under the Conscription Act of May 18, 1917, and unlawfully restrained of his liberty under said act.

Order.

This cause this day coming on to be heard upon the petition of Robert Cox for an Appeal to the Supreme Court of the United States from the final judgment heretofore rendered in this matter, whereby the application of the said petitioner for a writ of Habeas Corpus was denied and his said petition was dismissed, and upon reading and considering said petition and the assignment of errors filed herewith,

It is hereby ordered that an appeal be, and the same is hereby allowed to the Supreme Court of the United States from said final judgment, upon said Petitioner filing an appeal bond properly conditioned with good and sufficient sureties, the amount of which bond is fixed at the sum of $200.00, and which bond is now presented to the Court and is hereby approved.

And it is further ordered that the present custody of said petitioner be not disturbed, pending the final decision of said appeal.

Allowed this 4th day of January, 1918, at Kansas City, Kansas.

JOHN C. POLLOCK, *Judge.*

Endorsed: No. 1880. In the Matter of Robert Cox for Writ of Habeas Corpus. Order granting Appeal. Filed Jany. 4, 1918. Morton Albaugh, Clerk.

14 In the District Court of the United States, District of Kansas, First Division.

In the Matter of the Application of ROBERT COX for a Writ of Habeas Corpus.

Assignment of Errors.

Now comes the said Robert Cox, petitioner in this cause, and files the following assignment of errors upon which he will rely upon the prosecution of his appeal in the Supreme Court of the United States, in the above entitled cause, from the final order or

decree of this Honorable Court rendered on the 4th day of January, 1918, dismissing his said petition and denying the relief prayed therein.

I.

That the said District Court, by its said final order dismissing said petition and refusing to issue said writ of habeas corpus, has denied to said petitioner, a member of the National Militia conscripted as such, the constitutional exemption or immunity from military service beyond the territorial limits of the United States, guaranteed to him as a member of said National Militia by that part of Sec. 8 Art. I, of the Constitution which provides that "The Congress shall have power * * * to provide for calling forth the (National) militia to execute the laws of the Union, suppress insurrections and repel invasions."

II.

That the said District Court, by its said final order dismissing said petition and refusing to issue said writ of habeas corpus, has denied to said petitioner his plain and manifest constitutional right to be delivered from such unlawful custody or imprisonment, as the same appears upon the face of said petition,—all of the facts stated therein being admitted without any reservation whatever by said motion to dismiss, which is in law a demurrer to said petition.

15

III.

That the said District Court, by its final order dismissing said petition and refusing to issue said writ of habeas corpus, has denied to petitioner, a member of the National Militia conscripted as such, his plain and manifest constitutional right to be discharged from such military custody, as it is admitted by said motion or rather demurrer in question: "That your petitioner is now unlawfully detained and restrained of his liberty at Camp Funston by the military power of the United States, because he is so detained and restrained for the sole, only and declared purpose of being transported very soon to the battlefields of Europe, under void Executive orders to be made by the Secretary of War in open defiance of the Constitution of the United States."

IV.

That said District Court, by its final order dismissing said petition and refusing to issue said writ of habeas corpus, has denied to petitioner, a member of the National Militia conscripted as such, his plain and manifest constitutional right to be discharged from such military custody or imprisonment, because, after the National Militia as such has been called forth by Congress" to execute the laws

of the Union, suppress insurrections and repel invasions," within the territorial limits of the United States, it is the grossest and most flagrant of all abuses of executive power for the Secretary of War to declare that, under orders to be issued by the President of the United States, as Commander and Chief of the Armies thereof, he will with all convenient speed, send over three thousand miles of sea to the battlefields of Europe such National Militia, in open defiance of the Constitution of the United States.

16 Wherefore said petitioner prays that said final order or decree of said District Court be reversed, and that it enter such decree as may be directed by the Supreme Court of the United States.

HANNIS TAYLOR,
JOSEPH E. BLACK,
Counsel for the Petitioner Robert Cox.

Endorsed: #1880. In the matter of Robert Cox, Habeas Corpus, Assignment of Error. Filed January 4, 1918. Morton Albaugh, Clerk.

17 *Bond.*

Know all men by these presents, That we, Robert Cox, of Richmond, of the county of Ray and the State of Missouri, as Principal, and National Surety Company, a New York corporation as surety, are held and firmly bound unto Major General Leonard Wood Military Commandant United States Cantonment, Camp Funston, Kansas, in the full sum of Two Hundred Dollars, ($200.00) to be paid to the said Major General Leonard Wood, or his Successor, in said Office of Military Commandant, as aforesaid, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns jointly and severally by these presents.

Sign-, Seal- and Delivered by us this 4th day of January in the Year of our Lord, One Thousand Nine Hundred and Eighteen.

The Condition of the foregoing obligation is such that whereas in a certain matter pending in the District Court of the United States in and for the District of Kansas at Kansas City, Kans., aforesaid, in which the above bounden, Robert Cox, was petitioner, and in which said Robert Cox, by his said petition prayed the Court to grant him a Writ of Habeas Corpus in accordance with the prayer of his said petition, a certain judgment was rendered against the said Robert Cox, whereby it was ordered and adjudged that the application of the said petitioner for a Writ of Habeas Corpus be denied and his said petition be dismissed. And whereas, the said Robert Cox, has petitioned for and been allowed an Appeal from said final judgment to the Supreme Court of the United States.

Now the condition of the above obligation is such that if the said Robert Cox shall prosecute his said Appeal with effect, and
18 shall answer all damages and costs which may be adjudged against him, in case the said judgment shall be affirmed, then

the above obligation shall be void, otherwise to remain in full force and effect.

ROBERT COX. [SEAL.]
NATIONAL SURETY COMPANY, [SEAL.]
[SEAL.] By P. O. DRAPER, *Attorney in Fact.*

Signed, Sealed and Delivered in the presence of
JOSEPH E. BLACK.
KATHERINE BURKE.

Approved by
JOHN C. POLLOCK, *Judge.*

Endorsed: No. 1880. Bond given by Robert Cox, Appellant, in favor of Maj. Gen. Leonard Wood, Respondent. Appeal Bond. Filed Jan. 4, 1918. Morton Albaugh, Clerk.

19 In the District Court of the United States for the District of Kansas, United States of America.

Præcipe for Record.

In the Matter of ROBERT COX, Ray Co., Missouri, unlawfully detained and restrained of his liberty at Camp Funston, in the counties of Geary and Riley in the State of Kansas, by General Leonard Wood, the military commander thereof, the said Robert Cox being a member of the National Militia conscripted under the Conscription Act of May 18, 1917, and unlawfully restrained of his liberty under said Act.

The Clerk will please prepare a complete transcript of the record in the above entitled cause to be filed in the Supreme Court of the United States.

HANNIS TAYLOR,
JOSEPH E. BLACK,
Attorneys for Petitioner Robert Cox.

Received a copy of the foregoing præcipe for a record, this 4th day of January, 1908.

FRED ROBERTSON,
U. S. Attorney,
Attorney for Respondent.

Endorsed: No. 1880. In the matter of Robert Cox for Writ of Habeas Corpus. Præcipe for Record. Filed Jany. 4, 1918. Morton Albaugh, Clerk.

20 UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Morton Albaugh, Clerk of the District Court of the United States for the District of Kansas, do hereby certify the foregoing to be a

true, full and correct copy of the record and proceedings in said Court, in Case No. 1880, entitled, In the Matter of the Application of Robert Cox for a Writ of Habeas Corpus.

I further certify that the Original Citation is attached hereto and returned herewith.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office in Topeka, in said District of Kansas, this 15th day of January, 1918.

[Seal of District Court U. S., District of Kansas, 1861.]

MORTON ALBAUGH, *Clerk.*

Endorsed on cover: File No. 26300. Kansas D. C. U. S. Term No. 833. Robert Cox, appellant, vs. Major General Leonard Wood, Commandant of Camp Funston in the State of Kansas. Filed January 28th, 1918. File No. 26300.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 833

ROBERT COX, *Appellant*,

v.

Major General LEONARD WOOD, Commandant of Camp Funston, in the State of Kansas.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

MOTION TO ADVANCE.

Comes now the appellant and moves the court to advance this case, as it is a test case involving the constitutional exemption from military service abroad of the National Militia of the United States, conscripted under that part of Sec. 8, Art. I, of the Constitution which declares that "The Congress shall have power . . . to provide for calling forth the [national] militia to execute the laws of the Union, suppress insurrections and repel invasions." From the elaborate brief on the merits now on file in this case it appears (1) that the sacred constitutional immunity in question, *now about to be violated by the Executive Power*, is the most ancient known to English and American constitutional law; (2) that it has been recognized and defined not only by this court but by the

Department of Justice and by President Wilson himself in the most deliberate and solemn forms known to the law.

This court knows that before the Draft Cases were heard counsel for appellant informed it, in a brief filed as Amici Curiæ, that his case, *involving the vital constitutional question of the immunity of the National Militia from service abroad* (A QUESTION NOT PRESENTED IN ANY FORM IN ANY ONE OF THE DRAFT CASES), was on its way to this court as a test case. For that reason appellant's counsel appealed to this court not to prejudice, by anything which might be said in the Draft Cases, the vital question now presented by this record, *before this appellant could have his day in court, and be fully heard here as to the same.* With a delicacy and consideration for which we are grateful this court responded to our request, making but one allusion to the subject of military service abroad. That allusion merely states the historical fact—*very important to this appellant*—that it was necessary for the Parliament in 1916 so to amend the English Constitution as to make possible the sending of the English militia to France after the present war began. And yet with these record facts staring them in the face counsel for the Government, reckless of human life and liberty, have given notice, in this case, of a frivolous and unworthy motion "to dismiss or affirm," basing it upon *the sole ground* that this court has PREJUDGED AND FORECLOSED IN ADVANCE OF A HEARING this vital constitutional question, *involving not only the lives and liberties of half a million of American citizens, but the very life of the Constitution itself*—IN THE DRAFT CASES IN WHICH NO SUCH QUESTION WAS INVOLVED IN ANY FORM. The opinion delivered by this court in those cases conclusively refutes an indefensible imputation that should never have been made. In said "motion to dismiss or affirm" counsel

for the Government "moves the court to dismiss the above-entitled case [No. 883] on the ground that the alleged constitutional questions presented have been *foreclosed* by prior decisions of this court and therefore have become so devoid of merit that this court should decline to take jurisdiction of the appeal allowed herein." We pray the court to inspect its judgment in the Draft Cases, *thus alluded to*, in order to determine whether or no such gratuitous statement of counsel has any foundation whatever in fact. We pray the court to accept the brief now on file, on the merits of this case, and this motion as our answer to said "motion to dismiss or affirm."

Believing as we do that the constitutional questions presented herein, involving not only the lives of a half million of American youths but the life of the Constitution itself, are the most momentous that have been presented here since the case of Dred Scott, we pray the court to advance this case and to hear it in the near future at a time when it can give to it that careful and prolonged hearing which its gravity demands.

Humbly submitted,

HANNIS TAYLOR,
JOSEPH E. BLACK,
Counsel for Appellants.

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

ROBERT COX, APPELLANT,
v.
MAJOR GENERAL LEONARD WOOD, COMMANDANT of Camp Funston, in the State of Kansas. } No. 833.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

BRIEF FOR THE APPELLEE.

The appellant, Cox, describes himself in his petition as a zealous patriot, not only ready but willing to serve his country for any purpose which does not carry him into the presence of the armies now arrayed against the United States. From his home in Missouri, or his camp in Kansas, as the case may be, he bids defiance to the German Empire and all its allies, and challenges them to combat—but on American soil.

His burning valor suffers, however, in comparison with that of learned counsel, who, in his behalf, undertake no less a task than to rewrite the Constitution of the United States, and invoke as a consequence a reversal of the judgment of this

court lately rendered in the Selective Draft Law Cases, 245 U. S. 366.

II.

Appellant was called from civil life to military duty by the Selective Draft Law of May 18, 1917. He was not at the time a member either of the Regular Army, the National Guard, or of any body of Organized State Militia. He now anticipates orders assigning him to foreign service. He denies his liability thereto upon the ground that the Selective Draft Law was passed, not in pursuance of the power "to raise and support Armies" but as "calling forth the Militia to execute the Laws of the Union, suppress Insurrections, and repel Invasions." He avers, accordingly, that he can not lawfully be called upon to serve for any other than the purposes so specified, and more especially can not be called upon to perform military service beyond the territorial limits of the United States.

III.

To support this contention his counsel insist that the phrase "To raise and support Armies" is not complete as it appears in the Constitution, but must be revised to read "To raise and support *volunteer* Armies;" arguing that the clause in question authorizes solely "the raising of volunteer armies, into which no one but a volunteer has ever entered or can ever enter." (Brief, pp. 44–45.)

Similar liberties are taken with the wording of the militia clause, which is amended by counsel to read "The Congress shall have power * * * to provide for calling forth the *National* Militia to execute the laws of the Union, suppress insurrections and repel invasions;" and this "National" Militia is taken to be all those citizens who have not voluntarily enrolled themselves in the regular establishment.

IV.

These propositions have been so recently the subject of extended discussion and precise adjudication that it would be an imposition upon the court to labor them again. The Selective Draft Law Cases *supra,* 245 U. S. 366, are final and controlling. It is true that in none of that group of cases had the complaining draftees been ordered abroad, as indeed the present appellant has not yet been. But whether the court in its opinion did or did not approach the precise question, or whether in so doing its remarks were or were not *obiter,* is of no consequence, for the principles which those cases establish are decisive upon the present appeal.

V.

The brief of counsel for the appellant contains many phrases and sentences of a questionable and offensive character which may, nevertheless, be passed without comment as mere heated rhetoric.

Other passages are not to be so lightly disposed of. Pages 52 (beginning at the last paragraph), 53, 54, and 55 in particular are to be reprobated as a gross attack before this court upon the coordinate legislative and executive branches of the Government. Because of their scandalous and impertinent character the brief which contains them should be stricken from the files, or the objectionable passages be expunged by order of the court.

VI.

Counsel aver their belief that this case is the most momentous that has been presented here since the case of Dred Scott. If it were conceivable that counsel's view of the Constitution and the law could prevail, there would be no element of exaggeration in their statement; indeed it would be utterly inadequate to describe a judgment which by taking away from the United States all adequate power of self-defense would, in the light of past and present history, pronounce upon them the sure sentence of death.

VII.

The judgment of the court below should be affirmed.

JOHN W. DAVIS,
Solicitor General.

APRIL, 1918.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1917.

ROBERT COX, APPELLANT,
v.
MAJOR GENERAL LEONARD WOOD, COMMANDANT OF CAMP FUNSTON, IN THE STATE OF KANSAS. } No. 833.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

MOTION TO DISMISS OR AFFIRM.

Comes now the Solicitor General, appearing on behalf of appellee herein, and respectfully moves the court to dismiss the above-entitled case on the ground that the alleged constitutional questions presented have been foreclosed by prior decisions of this court and therefore have become so devoid of merit that this court should decline to take jurisdiction of the appeal allowed herein. See *Brolan* v. *United States*, 236 U. S. 216, 222.

In the alternative, the Solicitor General moves the court to affirm the judgment of the district court because the questions presented at the threshold of the case have been previously so specifically and ad-

versely ruled on by this court as to absolutely foreclose further contention on the subject. See *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311; *Johnson et al.* v. *McAdoo, Secretary*, 244 U. S. 643.

STATEMENT.

Appellant, not being a member of the National Guard and having been drafted into the National Army of the United States pursuant to the provisions of the so-called selective-draft law of May 5, 1917, 40 Stat. 76, and the proclamation of the President issued pursuant thereto on the same date, filed in the District Court of the United States for the District of Kansas a petition for a writ of *habeas corpus* directed to Maj. Gen. Leonard Wood, commandant of Camp Funston, where appellant was in the military service, on the grounds:

1. That the selective-draft law could only have been enacted by reason of Article I, section 8, of the Constitution, which provides that Congress shall have power—

> To provide for calling forth the militia to execute the laws of the Union, suppress insurrection and repel invasions,

and, therefore, appellant can not lawfully be called upon to serve for any other than the purposes so specified in the Constitution and can not be called upon to render military service beyond the territorial limits of the United States.

2. That said law contains no provisions authorizing the transportation "across the seas" for mili-

tary duty of the men called into the military service thereunder, and any Executive order so directing such transportation would be null and void and in violation of the provision of the Constitution above quoted. (R. 2–4.)

A motion to dismiss the petition and deny the writ was granted and an appeal directly to this court allowed by the district court. (R. 4–8.)

ASSIGNMENTS OF ERROR.

The assignments of error (R. 8–10) merely reiterate the grounds of the petition.

ARGUMENT.

I.

The case is controlled by the cases of Arver et al. v. United States, Nos. 663, 664, 665, 666, 681, and 769, this term, decided January 7, 1918.

The record presents only the constitutional objections asserted. These objections are dissimilar in matter of form only to those presented to the court, considered and rejected by it in the cases so recently disposed of.

It is submitted, therefore, that the appeal should be dismissed or the judgment affirmed.

JOHN W. DAVIS,
Solicitor General.

FEBRUARY, 1918.

O

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 833.

ROBERT COX, *Appellant*,

v.

Major General LEONARD WOOD, Commandant of Camp Funston, in the State of Kansas.

REPLY TO "BRIEF FOR THE APPELLEE."

I.

It is hard to understand why the term "brief" should be applied to a light, flippant and offensive paper in which the Solicitor General,—*after assuming that the Government does not need argument to support its monstrous pretensions, and after ridiculing and denouncing appellant for asserting the most ancient and sacred right known to the Constitution,*—has made a statement, *concerning a matter of vital importance*, which, as the record shows, is absurdly false. On page 1 this occurs: "His [appellant's] burning valor suffers, however, in comparison with that of learned counsel, who in his behalf, undertake no less a task than to rewrite the Constitution of the United States, *and to invoke as a consequence a reversal of the judgment of this court lately rendered in the Selective Draft Law Cases, 245 U. S. 366.*" When the Solicitor General made that scandalous misstatement he knew (1) that in the cases in question counsel

for appellant had filed a brief supporting the constitutionality of the Draft Act in terms far more cogent than his own; (2) that on page 15 of the brief filed in this case the following statement occurs: "To the judgment of the court [in the Selective Draft Law Cases] upon the only question before it—the constitutional right of Congress to pass a conscription law for home defense—*we heartily and humbly subscribe. Admitting the constitutionality of the act in question*, the contention here is that the National Militia, *duly conscripted under said act*, are endowed with an express constitutional exemption from service abroad, *a question this court could not possibly have considered in the Draft Cases for the conclusive reason that no such question was before it.*" And yet, despite these facts, so solemnly attested by the record, that appellant and his counsel affirm the constitutionality of the Draft Act and "*heartily and humbly subscribe*" to the decision made by this court in the Draft Cases, the Solicitor General, for the manifest purpose of exciting prejudice in the mind of this court against appellant and his counsel, has dared to assert that they are now striving to bring about "*a reversal of the judgment of this court lately rendered in the Selective Draft Law Cases, 245 U. S. 366.*" We humbly pray the court, as an act of justice to appellant and his counsel, to compel the Solicitor General to withdraw that scandalous misstatement before the oral argument begins. In a cause in which the lives and liberties of half a million of American citizens are involved, in a cause in which the life of the Constitution itself is involved, counsel for the Government should be admonished that their conduct should be marked, not by supercilious levity, but by a sincerity and seriousness which the American people, who have their all at stake, will demand.

II.

Equally reprehensible is the following statement made in the Government's brief on page 3: "But whether the court in its opinion [in the Selective Draft Law Cases] did or did not approach the precise question, or whether in so doing its remarks were or were not *obiter*, is of no consequence, for the principles which those cases establish are decisive upon the present appeal." We will not pause to expose the "constitutional immorality" involved in that reckless statement, because this court knows that, as the vital question at issue—*the exemption of the National Militia from service abroad*—was not presented in any form in any one of the Draft Cases, no decision could possibly have been made concerning it. There is in the opinion in question no "*obiter*," no decision as to any general principle that affects it. This court knows (1) that the exemption in question was fundamental in English constitutional law for a thousand years before the settlement of this country; (2) that it was imbedded in express terms in the Constitution drafted at Philadelphia in 1787; (3) that a shameless attempt to destroy it by acts of Congress during the War of 1812 was trampled to death by Webster in 1814; (4) that this court expressly recognized and affirmed it in 1827 in the case of Martin *v.* Mott, 12 Wheat. 19; (5) that when a second shameless attempt to destroy it by an act of Congress was made after the Spanish-American War that attempt was trampled to death in 1912 in an exhaustive opinion prepared by Attorney General Wickersham and accepted as final by President Taft; (6) that in 1916 it was solemnly reaffirmed in four speeches made at New York, Cleveland, Milwaukee and Topeka by President Wilson, who is now appealing to this court to disregard what he then said; (7) that in 1916 it was necessary for the Omnipotent Parliament to

remove it from the English Constitution by an amendment of it in order to make possible the sending of the English Militia to France, where they had never been seen before in all history. Mastered and overcome by that majestic line of authority, *to which the President himself is irrevocably committed*, counsel for the Government, throwing up their hands in despair, now confess to the court, in what they are pleased to call a "Brief for the Appellee," that they have no arguments, no authorities whatever, to offer against it. Nothing therefore remains to support the Government's contention, except the menacing force of war-passions—a force against which the fathers attempted to provide (1) by the creation of express constitutional limitations; (2) by the creation of this court, armed with full power to enforce them. *Which shall prevail—the passions of the hour, or the Constitution?* Upon the answer to that question of questions the life of the Constitution of 1789 now depends!

III.

No attempt has been made to remove by amendment that part of the Constitution which expressly forbids the sending of the National Militia beyond our territorial limits; no attempt has been made to obtain from the Congress any kind of an expression of its permission or willingness that the National Militia shall be so employed. The American people have given no authority, *in any form known to the Constitution*, to any one to overturn the foundation stones of our national life by the sending of raw and untrained National Militia over three thousand miles of sea to be butchered by trained and seasoned veterans on the battlefields of Europe, and "in the broils of Europe." Those who are now promoting that dreadful and fateful enterprise are hoping to obtain from this court an authority they dare not ask from the people themselves, or their

representatives. This court is now asked so to torture a a few *cabalistic words* [*"or if and whenever the President decides that they can not effectually be so raised or maintained, then by selective draft"*] contained in Section 2 of the Act of May 18, 1917, as to arm the Chief Magistrate of a strictly limited Constitutional Democracy with the autocratic power to send, *by a mere military order*, "hundreds of thousands, perhaps millions, "of American citizens to fight and to die upon the banks of the Seine, the Rhine, the Danube, the Nile, the Euphrates, as his sovereign will may whisper. Is it possible that, in the face of the limitations of the Constitution, this court can torture by mere construction out of the cabalistic words in question such military authority for the President as has been heretofore vested only in Oriental despots? Before this court can reach such a result it must walk with naked feet over burning plowshares in the form of certain rules for the construction of statutes which have been stated already (see main brief, pp. 51–53).

IV.

To four of those rules of construction special emphasis will be given here. First, every statute must be construed in favor of liberty; second, every statute must be so construed as to avoid unconstitutionality; third, every statute must be construed with reference to the object intended to be accomplished by it; fourth, and most important of all, every court in construing a statute must look ahead and consider well in advance the "*effects and consequences*" which a given construction is likely to bring about. Guided by those rules this court is bound to know that the object intended to be accomplished by the construction asked at its hands in this case is to arm the President with *a stupendous power* never before exercised by any of his

predecessors; he has himself declared, in a notable address, that "*American armies were never before sent across the seas.*" The court knows judicially that this desperate adventure, without precedent in our history, is also without precedent in the history of civilized nations when the sending of raw and untrained conscripts over three thousand miles of sea to fight trained and seasoned veterans is taken into account. When the time came for Great Britain to crush the Dutch Republics in South Africa she did not send her militia; she sent forty-seven thousand seasoned veterans, her regular army, every member of which was a volunteer. *All who followed were volunteers.* Never in the history of civilization, ancient, medieval or modern, have raw conscripts been sent over sea to fight veterans in foreign lands. The court knows judicially, as a part of our current history, that our conscripted militia about to be sent abroad to fight veterans is so raw and untrained that it can not be used as separate units; that it must, on account of the lack of training, be fused into the ranks of foreign nations and thus lose its identity.

What then will be the "*effects and consequences*" of such a desperate adventure if this court so construes the statute in question as to recognize in the President the unprecedented and despotic power he claims under it? As it has been held in United States *v.* Hamburg-Amerikanische Co., 239 U. S. 475, that this court takes "judicial notice" of the existence of "the European War which is now flagrant," and of "*the inevitable legal consequence springing from*" it, it must know (1) that the transportation of hundreds of thousands of conscripted militia across three thousand miles of sea infested by deadly submarines must inevitably result in the deaths of thousands in that way; (2) that, if they land safely, in their raw and untrained condition they must inevitably perish by wholesale when

they are forced to fight, as they will be, with trained and seasoned veteran troops. But more important still is the fact, which the court must know judicially, that if *this home defence force*, which the Constitution has specially created for that express purpose, is transported over sea and annihilated at this critical juncture, this country may be exposed to invasion by triumphant European armies in the absence of its natural defenders. Last and most of all this court knows judicially that there is now in this country a powerful faction, with distinguished leaders, obsessed with the wild and fantastic idea that this unconstitutional process of conscripting the National Militia *for service abroad* must go on until the United States puts "*an army of from 5,000,000 to 7,000,000 men*" in the slaughter pens of Europe. If this court opens the door to such madness by a decision in this case favorable to such an adventure, who can doubt that the "*effects and consequences*" will be so terrible as to threaten not only the internal peace but the very life of the Republic itself.

In the light of current events of which the court has judicial knowledge who is so blind as not to perceive that the startling and unprecedented adventure, involving the sudden conscription of millions of raw youths, without any prior military training whatever, for the purpose of transporting them immediately over thousands of miles of sea in order that this nation may become a dominating factor in a European land war carried on between seasoned veterans, is *a chimera* far beyond the limits of the practical or possible. In the hope of making all such adventures unthinkable the fathers deliberately devised *a peculiar military system*, which they embodied in the Constitution of 1789, so designed as to make us the strongest of nations for national defense and the weakest for the purposes of foreign aggression. If this court by its judgment in this

case will only uphold that military system, *so perfectly adapted to our geographical and political situation*, it will completely protect this nation against all such desperate adventures in the years that are yet to come.

All of which is most humbly submitted.

HANNIS TAYLOR,
JOSEPH E. BLACK,
Counsel for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 833.

ROBERT COX, *Appellant*,

v.

Major General LEONARD WOOD, Commandant of Camp Funston, in the State of Kansas.

MOTION OF APPELLANT FOR A RULE TO PUNISH THE APPELLEE FOR CONTEMPT BECAUSE, AFTER THIS APPEAL HAD BEEN TAKEN AND THE RECORD THEREIN DULY FILED IN THIS COURT, HE, IN FLAGRANT CONTEMPT OF ITS JURISDICTION AND AUTHORITY, MOST UNLAWFULLY REMOVED APPELLANT FROM THE TERRITORIAL LIMITS OF THE UNITED STATES TO THE BATTLEFIELDS OF FRANCE, WHERE HE WAS UNLAWFULLY HELD AND EXPOSED TO DEATH, WITHOUT THE KNOWLEDGE OF HIS COUNSEL, FOR WEEKS BEFORE HIS CASE COULD BE HEARD HERE.

Appellant now comes and respectfully moves the court to grant such rule upon the statement of facts set forth above. As such statement of facts was made in open court on April 18, 1918, during the hearing of said cause, in the presence of the Solicitor General representing the Government, *and admitted by him to be true* BY HIS SILENCE, *and by his failure to question or contradict the same in any form*, such statement has been fully established by such admission, certainly so far as this motion is concerned.

As the court well knows, the gross abuse of the military power vested in the appellee as a Major General of the

Army of the United States by the violent taking of appellant out of its jurisdiction, *at a time when he was held by it under the sacred writ of habeas corpus, and prior to his trial here under said writ*, is a return to the barbarous practices of King John of England, whose habit it was "to proceed by force of arms against recalcitrants as though assured of their guilt, *without waiting for legal procedure.*" McKechnie, *Magna Carta*, p. 438, citing Bigelow (*Procedure*, p. 155), who says: "The practice of granting writs of execution without trial in the courts was very common." The author first named says that the main object of chapter 39 of Magna Carta, establishing due process, was to forbid John from proceeding by force of arms, that is, by the "*sending*" of companies of soldiers "*to place execution before judgment,*" as Major General Wood has done in this case, acting, of course, under the direction of the Executive power. This terrible exhibition of reckless and revolutionary violence, unparalleled even in the darkest days of the Revolutions of 1640 and 1688, should admonish this court that if, by deciding this case against appellant, it arms the Executive power with absolute control over the sword—*the control asked being more complete than that now vested even in the Emperor of Germany*—it will be completely under the heel of such power which, as the next step, may demand the absolute right to dictate its decisions upon all public questions *affecting its policy.*

Appellant's motion in its complete form is this: First, that Major General Wood be required to restore appellant *immediately* to the jurisdiction of this court; second, that such a "hearing" then be had of this cause at the bar of this court as the Constitution prescribes; third, that in the meantime this court withhold any expression of opinion as to the merits of a case which, in its present condition, it has no jurisdiction to decide. English and

American jurisprudence has always rejected and abhorred that odious principle of Roman law which permits *the trial of a man in his absence.* Such abhorrence should be deepened in this case by the fact the appellant, *while in the guardianship of this court under the sacred writ of habeas corpus,* has been most unlawfully and brutally abducted by the Executive power acting through a Major General of the Army of the United States. Certainly no one will contend that this court has any legal authority to render any judgment affecting adversely this poor young man of the people prior to his restoration to its jurisdiction. This court under existing conditions has jurisdiction over this case *for a single purpose only, that is to say, jurisdiction to compel appellee to restore appellant to its custody.*

Counsel for appellant move that, after his restoration to this jurisdiction, he be given such a "hearing" at the bar of this court as will satisfy the principles of due process as they have been defined here. If Congress has no power to destroy due process by statute, certainly this court has no power to destroy it by a mere rule, or *by such an unlawful application of a rule in a special and extraordinary case as renders real oral argument in that particular case impossible.* Appellant claims that in that way due process was denied him in this case in this court—*a constitutional question of the highest dignity upon which only the court as a whole can pass.* To this extraordinary case—*a test case to determine the meaning of a vital clause of the Constitution affecting the lives of hundreds of thousands, perhaps millions, of American citizens threatened with transportation to European battlefields in the execution of a desperate and unprecedented adventure—days and not hours* should have been given for argument, according to every principle of justice and fair play. When, under such extraordinary conditions, counsel for

appellant begged the court for only three hours and a half for the entire oral argument, that most reasonable and moderate request was peremptorily denied. *Counsel for appellant are informed that never before in its entire history has this court ever refused to allow reasonable and necessary time for the argument of a case involving a supremely important constitutional question of national importance.* In the arctic atmosphere created by such an unprecedented and ominous refusal of a request, *granted in all like cases as a matter of course*, counsel for appellant raced on in the vain hope of accomplishing an impossible task. After that had proved impossible, the disclosure was made to the court of the abduction of appellant in the manner stated already. By that time counsel for appellant had completed *less than half of his argument; only the premise had been stated; at least two hours more were absolutely necessary for its completion.* When under such conditions counsel made a fresh appeal to the court to grant him the time absolutely necessary to complete his argument, he was peremptorily commanded by the Chief Justice "to take his seat," unless he was content to confine himself to the beggarly and inadequate fragment of time that remained to him under the original allotment. And so such a "hearing" as the Constitution guaranteed in such a case to appellant was denied him. Certainly after the return of appellant to this jurisdiction the court will secure to him such a hearing as is guaranteed by the Constitution. Having been brutally abducted by the Executive power and transported to a foreign land in defiance of due process, appellant certainly should not be denied by this court, after his return, the "hearing" guaranteed by due process. As this tribunal was made by the fathers the sworn and official guardian of the Constitution, it should extend its aid and sympathy and not its hostilities to the faithful few who, with their

backs to the wall, are striving to defend it against an aggressive dictatorship that has already trampled underfoot nearly every form of civil liberty, including the grossest of all insults to the sacred writ of habeas corpus.

Counsel for appellant beg leave to submit in support of this motion a further reason why the court should, *for its own sake*, order in this case, after the return of appellant, a most complete and exhaustive oral argument. This court knows from its records that the single question presented and decided in the Draft Cases was the constitutionality of the Draft Act of May 18, 1917, passed, as was its only predecessor, the Act of March 3, 1863, under that part of Sec. 8, Art. I, of the Constitution, which declares that Congress shall have power "to provide for calling forth the [*national*] militia to execute the laws of the Union, suppress insurrections and repel invasions." *In the preamble of the Act of 1863, the declaration is expressly made that it was passed under the clause in question.* The suggestion that the mere fact that this court referred, as pure *obiter*, in its opinion in the Draft Cases to that part of Sec. 8, Art. I, which declares that Congress shall have power "to raise and support [*volunteer*] armies" (A CLAUSE WHICH HAS NO MORE REAL CONNECTION WITH THE SUBJECT NOW BEFORE THE COURT THAN THE "COMMERCE CLAUSE") makes such reference *an adjudication in this case* is a dishonest and frivolous sophistry unworthy of consideration here. Counsel for the Government, with commendable candor, have refused to take any such position. The Solicitor General in the brief filed for appellee has not ventured to go farther than this statement: "It is true that in none of that group of cases [the Draft Cases] had the complaining draftees been ordered abroad, as indeed the present appellant has not yet been [*he had been actually transported when that was written*]. But whether the court

in its opinion did or did not approach the precise question, or whether in so doing its remarks were or were not *obiter*, is of no consequence, *for the principles which those cases establish are decisive upon the present appeal.*"

There was but *one principle* settled in the Draft Cases and that was that Congress could call out the *National Militia by conscription*, as it had done by the Act of March 3, 1863, which, in its preamble, declared expressly that it was enacted under the clause authorizing Congress "to provide for calling forth the [National] Militia to execute the laws of the Union, suppress insurrections and repel invasions." Instead of placing the conscripting power, *resting upon one long settled precedent*, upon the only clause upon which it can possibly be placed, the court, *by inadvertence*, in the Draft Cases (most inadequately argued) *intimated* that it could be grounded upon the clause which authorizes Congress "to raise and support [volunteer] armies. No more untenable proposition ever emanated from the wit of man, because when an attempt is made to uphold it from *the historical point* of view, every precedent in English and American constitutional history cries out against it. The regular army of England has ever been a *volunteer* army; the regular army of the United States is and has ever been a *volunteer* army. Only a *volunteer* can enter it. As Upton says: Since the foundation of this Government, our regular volunteer army has been raised under the clause authorizing Congress "to raise and support [volunteer] armies." It is absurd, really an Irish bull, to talk about forcing men into a *volunteer organization by compulsion.* Men were never added by conscription to the regular volunteer army of England prior to the Revolution. "In 1704, and again in 1707, conscription bills were attempted in Parliament, but laid aside *as unconstitutional.*" Kneedler *v.* Lane, 45 Penn. State, p. 255.

During the War of 1812, when the ranks of the regular army could not be filled by volunteers and the militia claimed their exemption from service abroad, certain unscrupulous persons, disloyal to the Constitution, attempted to circumvent the plain constitutional exemption by pretending, as Webster has expressed, that Congress has the right "*to enact a law enforcing a draft of men out of the militia into the regular army.*" Webster's speech of Dec. 9, 1814, shows that that unscrupulous and bungling device was presented in every possible form in the Congress of 1814, at the time when he assembled all such serpents in one pen and trampled them to death. If the court will only study that immortal constitutional exposition it will find that *the shop-worn device now before the court* was analyzed by Webster from every point of view and destroyed, not simply because it was absurd, but because it was *criminal.* He said that the death in a foreign land of any conscripted man taken away by that device was "*murder.*" His precise words were these: "If, sir, in this strife he fall—if, while ready to obey every rightful command of government, he is forced from his home against right, *not to contend for the defence of his country, but to prosecute a miserable and detestable project of invasion, and in that strife he fall, it is murder!*"

Nothing can be more withering than the three pages (see The Writings and Speeches of Daniel Webster, vol. 14, pp. 62–65, ed. of 1903) in which he denounces those who attempt to deprive the national militia of their exemption from service abroad by the bald, unhistorical, illogical pretention that they may be *drafted into the regular volunteer army* under the clause authorizing Congress "to raise and support [volunteer] armies." If the court will only read those pages, it will never listen to the pending proposal to secure for identically the same ridiculous and unlawful device, the sanction of this court,

a device for the second time trampled to death by Attorney General Wickersham in 1912, with the cordial approval of President Taft. So utterly untenable is such contention that the learned, able and resourceful Solicitor General threw up his hands in despair and refused to attempt to defend it. This court can never uphold it except in a *per curiam* opinion that declines argument.

Certainly no one will deny that, *no matter how this court may decide this case*, the shocking and unprecedented contempt through which the appellee took by the violent hand of military power this appellant from the jurisdiction of this court, *while he was held here under the sacred writ of habeas corpus*, must be punished with the severity it deserves. Why has not the Executive power, which has committed this outrage, ordered the return of this appellant to the jurisdiction of this court *by telegraph*, with an humble apology for its act? Nothing has so far been done, so far as we know, except the complete concealment of the facts from the American people through a vigorous employment of the censorship, which has excluded from every newspaper in this capital any mention of the disclosure made to this court on April 18.

Having presented to the court, in the narrowest possible compass, the reasons upon which this motion rests, we now respectfully move the court: First, to require the appellee to restore, *with all possible speed*, this appellant to the jurisdiction of this court; second, when he shall have been so restored, to secure to the appellant such "a hearing" as the Constitution guarantees; third, in the meantime, to withhold any decision as to the merits of this case.

Most respectfully submitted,

HANNIS TAYLOR,
JOSEPH E. BLACK,
Counsel for Appellant.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1917.

No. 833

ROBERT COX, *Appellant*,

v.

Major General LEONARD WOOD, Commandant of Camp Funston, in the State of Kansas.

APPEAL FROM A FINAL ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS DENYING THE WRIT OF HABEAS CORPUS.

APPELLANT, A MEMBER OF THE NATIONAL MILITIA, LAWFULLY CONSCRIPTED UNDER THAT PART OF SEC. 8, ART. I, OF THE CONSTITUTION WHICH DECLARES THAT "THE CONGRESS SHALL HAVE POWER . . . TO PROVIDE FOR CALLING FORTH THE [NATIONAL] MILITIA TO EXECUTE THE LAWS OF THE UNION, SUPPRESS INSURRECTIONS AND REPEL INVASIONS," CLAIMS AT THE HANDS OF THIS COURT HIS CONSTITUTIONAL IMMUNITY FROM SERVICE ABROAD WHICH THE PROVISION IN QUESTION EXPRESSLY GUARANTEES TO HIM.

BRIEF AND ARGUMENT FOR APPELLANT.

HANNIS TAYLOR,
JOSEPH E. BLACK,
Counsel for Appellant.

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APPENDIX.

The first, the Act of March 3, 1863, *states expressly in its preamble* that it was enacted under that part of Sec. 8, Art. I, which declares that "the Congress shall have power . . . to provide for calling forth the [National] Militia to execute the laws of the Union, suppress insurrections and repel invasions." The second, the Act of May 18, 1917, *a substantial reproduction of the first*, was unquestionably enacted under the same clause.

AUTHORITIES CITED.

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Major General LEONARD WOOD, Commandant of Camp Funston, in the State of Kansas.

APPEAL FROM A FINAL ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS DENYING THE WRIT OF HABEAS CORPUS.

BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF THE CASE.

In his petition for habeas corpus presented to the Hon. John C. Pollock, United States District Judge for the District of Kansas, Robert Cox avers that "having been born in the State of Missouri on the 31st day of August, 1895, [he] is a citizen of the United States, and as such is subject to the operation of the Conscription Act of May 18, 1917, passed, as he is informed and believes, under that part of Sec. 8, Art. I, of the Constitution of the United States which provides that 'The Congress shall have power . . . to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions.' As a patriotic citizen, devoted to the Constitution and laws of his country, your petitioner,

who has been duly conscripted under said Act, is not only ready but willing to serve as a member of said National Militia, for any one or all of the three purposes which the Constitution specifies.

"2. That your petitioner further avers that he is advised and believes, and so charges, that he cannot be lawfully called upon to serve for any other purpose; that he cannot be lawfully called upon as one conscripted under said Act to render military service beyond the territorial limits of the United States. Your petitioner further avers that he is informed and believes, and so charges, that the Congress, in enacting said legislation under which he has been drafted and confined in said Camp Funston, has not attempted to authorize, directly or indirectly, the transportation of said drafted National Militia 'across the seas;' neither has it manifested any consciousness, by any positive utterance that such an unprecedented act would be attempted by anyone. Petitioner avers that in what is known as his Flag Day address of June 14, 1917, the President of the United States solemnly and truthfully declared that 'American armies were never before sent across the seas.'

"3. That it is the undoubted constitutional right and immunity of your petitioner to be exempt, as a member of said conscripted National Militia, from military service beyond the territorial limits of the United States, because, as he is informed and believes, and so charges, that such constitutional right and immunity solemnly defined in Sec. 8, Art. I, of the Constitution, was recognized and affirmed by the Supreme Court of the United States in 1827; by Attorney General Wickersham in an official opinion, dated February 17, 1912; by President Wilson in four speeches delivered in January and February, 1916.

"4. That despite such express constitutional right and immunity from service abroad, your petitioner, together

with thousands of other citizens of the United States, has been compelled to leave his home, and is now confined against his will by the military power of the United States for the express, declared and unlawful purpose of being transported to the battlefields of Europe in open defiance of the Constitution of the United States."

Such are the vital and basic facts stated upon the face of appellant's petition for habeas corpus, all of which were admitted, as stated, by the Government's motion to dismiss, filed December 15, 1917, in the following form: "Comes now the respondent, Major-General Leonard Wood, military commander of Camp Funston, and moves the court to dismiss the application herein for the reasons, to wit:

First.—That said application does not state facts sufficient to give the court jurisdiction, power or authority to grant the writ of habeas corpus prayed for.

Second.—The petition for the writ shows on its face that if the writ be granted, on the return of the same, said writ would be discharged and petitioner remanded to the custody of your respondent."

Upon the pleadings thus made up the case was submitted to the District Judge who, on January 4, 1918, rendered the following final judgment from which this appeal was taken:

FINAL ORDER OF DISMISSAL.

This matter was submitted on the 20th day of December, 1917, for hearing on the motion to quash presented by respondent and praying the court to dismiss the petition of said Cox for a writ of habeas corpus. Said "motion to quash," equivalent in law to a demurrer to said petition, admits the following facts stated therein:

1. That petitioner has been duly conscripted under the Conscription Act of May 18, 1917.

2. That "as a patriotic citizen, devoted to the Constitution and laws of his country, your petitioner, who has been duly conscripted under said Act, is not only ready but willing to serve as a member of said National Militia for any one or all of the three purposes which the Constitution specifies."

3. That "in what is known as his Flag Day address, the President of the United States solemnly and truthfully declared that 'American armies were never before sent across the seas.'"

4. That "your petitioner, together with thousands of other citizens of the United States, has been compelled to leave his home, and is now confined against his will by the military power of the United States, for the express, declared . . . purpose of being transported to the battlefields of Europe. . . . As early as June 16, 1917 (see Congressional Record of July 20, 1917, pp. 5864–5), the Secretary of War made a formal declaration of the fact that not only the State militia (now called the National Guard) but also the National Militia (now called the National Army) were to be sent to France with all convenient speed. . . . That your petitioner will surely be so transported unless he is delivered by the order of this Honorable Court."

Upon the foregoing state of facts, appearing upon the face of said petition and admitted by said motion to quash, petitioner, after affirming the validity of said Conscription Act of May 18, 1917, pleads what he calls his constitutional immunity from military service beyond the territorial limits of the United States. Such claim of constitutional immunity rests upon the contention that no conscription act can be passed except under that part of Sec. 8, Art. I, of the Constitution, which provides that "The Congress shall have power . . . to provide for calling forth the militia to execute the laws of the

Union, suppress insurrections and repel invasions,"—a provision which, as construed by the Supreme Court of the United States and by Attorney General Wickersham on February 17, 1912, expressly forbids, as petitioner contends, the employment of any part of said militia so called forth beyond the territorial limits of the United States.

Knowing as the court does that it is the purpose of this proceeding to bring before the Supreme Court of the United States, as speedily as possible and upon a direct appeal, this grave and far-reaching constitutional question, it has resolved, in order to facilitate that result, to sustain said motion to quash and to dismiss said petition of Robert Cox for a writ of habeas corpus upon the facts stated therein, and to that end this final order of dismissal is made. To which order of the court in sustaining the motion to dismiss and to the order of the court dismissing the petition for the writ, and to the order of court made denying the writ prayed and each and all of said orders and to the making of the order made by the court herein, petitioner in open court excepted and excepts and prays his exceptions be allowed of record, which is done accordingly.

Done this January 4th, 1918, at Kansas City, Kansas.

JOHN C. POLLOCK,
Judge.

AN UNLAWFUL AND VICIOUS NOMENCLATURE ELIMINATED BY THE PLEADINGS HEREIN. THE LAW KNOWS NO SUCH THING AS "A NATIONAL ARMY."

As this court is a constitutional creation, so are the military forces of the United States which derive not only their *peculiar characteristics*, but their *historic names* directly from the Constitution itself. As will be demonstrated hereafter, our military system, as embodied

in the Constitution of 1787, is simply a reproduction, *with the smallest possible change*, of the English military system as it existed at that date. It consists of three distinct elements.

1. The first element is represented by the regular army and navy of the United States, *a strictly volunteer organization*, copied from that of England as it existed in 1787. The regular army of Great Britain has always been and is now based exclusively on the "*volunteer system.*" In emphasizing the "volunteer character of the British system," *The Times History of the War in South Africa*, 1899–1902, vol. II, p. 29, says: "In the first place the British system was entirely voluntary. . . . Whether in the Regular Army, in the Militia, or the Volunteers, whether from the desire to earn a reputation or a competence, from a love for the military life or from a feeling of patriotism, the British soldier in all ranks, *served of his own personal initiative.*" In order to authorize the creation of a Regular Army on the volunteer basis, the Convention of 1787, after giving to Congress the power "to declare war," provided in Sec. 8, Art. I, that "The Congress shall have power . . . to raise and support armies, but no appropriation of money to that use shall be for longer than two years [the English Mutiny Act of 1688]; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces." Those three provisions, grouped together as a connected whole, relate solely and exclusively to one subject matter—the creation, maintenance and government of *the regular army and navy of* the United States, which is now and has always been maintained "BY VOLUNTARY ENLISTMENT." This basic fact is perfectly well known even to professional soldiers who are not lawyers. General Upton, in speaking of the provisions in question, in his *Military Policy of the United*

States, p. 79, says: "Here was laid the foundation of the VOLUNTEER SYSTEM, which attained its fullest development during our long civil war. The 'levies,' known later as 'volunteers,' were authorized under *the plenary power of Congress to 'raise and support armies,'* and the power appointing these officers was given the President, to whom it obviously belonged, as the 'levies' WERE WHOLLY DISTINCT FROM THE MILITIA OR STATE TROOPS." For a century and a quarter Congress has been giving a practical construction to these constitutional clauses, by *raising, supporting and governing* under them the regular army and navy of the United States as VOLUNTEER SYSTEMS, ENTIRELY SEPARATE AND APART FROM THE MILITIA SYSTEMS, NATIONAL AND STATE. Congress has always designated this volunteer army as the "*Regular Army*" of the United States. It is so described in the Act of May 18, 1917, with which the court has now to deal.

2. The second element is represented by the State militia which may, under certain conditions, be drawn into the service of the National Government under this clause of Sec. 8, Art. I: "The Congress shall have power . . . to provide for organizing, arming, and disciplining the [State] militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress."

3. The third element is represented by the National Militia, created by the Federal Convention of 1787 under that clause of Sec. 8, Art. I, which provides that "The Congress shall have power . . . *to provide for calling orth the [National] Militia to execute the laws of the Union, suppress insurrections and repel invasions.*" When this subject came for the first time before this court in Houston *v.* Moore, 5 Wheat. 7, the two distinct systems of militia—

the one created and maintained by the States, the other created and maintained by the Federal Government—were recognized and defined in terms so clear and distinct as to preclude all doubt or confusion upon the subject. Mr. Hopkins for the plaintiff in error said in his brief: "'The power to govern the militia thus called forth, and employed in the service of the United States, is exclusively in the National Government. *A National Militia grew out of the federal constitution, and did not previously exist. It is in its very nature one indivisible object, and of the utmost importance to the support of the federal authority and government,*" citing Livingston *v.* Van Ingen, 9 Johns. Rep. 507, 565, 575. In accepting that view, and in drawing the line between the new National Militia and the pre-existing State militia, the Court said: "But as State militia the power of the State governments to legislate on the same subjects, having existed prior to the formation of the Constitution, and not having been prohibited by that instrument, it remains with the States, subordinate nevertheless to the paramount law of the general government, operating upon the same subject. On the other side, it is conceded that, after a detachment of the [State] militia have been called forth, and have entered into the service of the United States, the authority of the general government over such detachment is exclusive. This is also obvious. *Over the* NATIONAL MILITIA, *the State Governments never had, or could have jurisdiction. None such is conferred by the Constitution of the United States; consequently none can exist. . . .* It is obvious that there are two ways by which the militia may be called into service; the one is under State authority, *the other under the authority of the United States.*"

In this case the court has to deal only with the "*National Militia*" created by that part of Sec. 8, Art. I, which provides that "The Congress shall have power

. . . to provide for calling forth the [National] Militia to execute the laws of the Union, suppress insurrections, and repel invasions." This force was thus created and *baptized* by the Constitution itself, and *rebaptized* by this court as "*the National Militia*" in Houston *v.* Moore, 5 Wheat. 17. The greatest possible emphasis is given to this matter at the outset because "the National Militia," *as a constitutional creation*, represents a thousand years of preceding constitutional history. For ten centuries, prior to our severance from the mother country, "the constitutional force" known in England as the "militia" was exempt from service abroad; and it was that immemorial exemption that was anchored by the Convention of 1787 in the Constitution of the United States. For that reason the moment that the exigencies of the present war suggested the necessity of stripping the National Militia of its immemorial constitutional exemption from service abroad, certain administrative officials, acting in open defiance of the Constitution and laws of the United States and of the judgments of this court, undertook to label (perhaps we should say libel) the "National Militia" by calling it "*the National Army*," A PHANTOM BODY WHICH HAS NO LEGAL EXISTENCE WHATEVER. A careful scrutiny of the Conscription Act of May 18, 1917, by which the National Militia, to which Robert Cox belongs, was called forth by Congress, will settle the fact that the new-fangled phrase "*National Army*," as applied to the National Militia, has received no sanction whatever from that body. THE OBVIOUS PURPOSE OF THIS AUDACIOUS ATTEMPT TO ROB THE NATIONAL MILITIA OF ITS HISTORIC NAME WAS, OF COURSE, TO DEPRIVE IT OF ITS IMMEMORIAL AND CONSTITUTIONAL RIGHT TO EXEMPTION FROM SERVICE ABROAD, TO WHICH THE NON-EXISTENT NATIONAL ARMY COULD LAY NO CLAIM.

There can, however, be no possible confusion or dif-

ficulty as to this branch of the subject, in this case, because in his petition for habeas corpus the appellant has averred that he was conscripted as a member of the National Militia and the Government has irrevocably admitted that fact by admitting the following allegations:

"Your petitioner, Robert Cox, humbly petitioning, showeth unto the court as follows:

1. That your petitioner, having been born in the State of Missouri on the 31st day of August, 1895, is a citizen of the United States, and as such is subject to the operation of the Conscription Act of May 18, 1917, passed, as he is informed and believes, under that part of Sec. 8, Art. I, of the Constitution of the United States, which provides that 'the Congress shall have power . . . to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions.' As a patriotic citizen, devoted to the Constitution and laws of his country, your petitioner, who has been duly conscripted under said Act, is not only ready but willing to serve, as a member of said *National Militia*, for any one or all of the three purposes which the Constitution specifies. . . . Your petitioner further avers that he is informed and believes, and so charges, that the Congress, in enacting said legislation under which he has been drafted and confined in said Camp Funston, has not attempted to authorize, directly or indirectly, the transportation of said *drafted National Militia* 'across the seas.'"

CONGRESS HAS FIXED THE FACT THAT ALL CONSCRIPTS UNDER THE ACT OF MAY 18, 1917, ARE TAKEN FROM THE "UNORGANIZED MILITIA OF THE UNITED STATES."

The Conscription Act of May 18, 1917, says, in its opening words, that it is merely a supplement to or extension of "*the National Defense Act approved June third, nineteen hundred and sixteen*," which expressly declares that the

military forces of the United States consist (1) of "the Regular [volunteer] Army"; (2) of the State Militia (called the National Guard); and (3) of "the unorganized militia of the United States." *The court will search the Act of June 3, 1916, in vain for the freshly coined device,* "THE NATIONAL ARMY," *which administrative officials had not then* CREATED.

Sec. 57 of the National Defense Act of June 3, 1916, reads as follows: "COMPOSITION OF THE MILITIA.—The militia of the United States shall consist of all able-bodied male citizens of the United States and all other able-bodied males who have or shall have declared their intention to become citizens of the United States, who shall be *more than eighteen years of age and, except as hereinafter provided, not more than forty-five years of age, and said militia shall be divided into three classes, the National Guard, the Naval Militia, and the Unorganized Militia.*" The act of May 18, 1917, simply an extension of the Act of June 3, 1916, amplifies in its Sec. 2 the foregoing definition of the National Militia in this form: "Such draft as herein provided shall be based upon liability to military service of all male citizens or male persons not alien enemies who have declared thair intention to become citizens, *between the ages of twenty-one and thirty years, both inclusive,* and shall take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act. Quotas from the several States, Territories, and the District of Columbia, or subdivisions thereof, shall be determined in proportion to the population thereof, and credit shall be given to any State, Territory, District, or subdivision thereof, for the number of men who were in the military service of the United States as members of the National Guard on April first, nineteen hundred and seventeen, or who have since said date entered the military service of the United States from any such

State, Territory, District, or subdivision, either as members of the Regular Army or the National Guard." The Act of May 18, 1917, takes all possible pains to proclaim, first, that all soldiers drafted and organized under it are absolutely separate and distinct from "the Regular Army" of the United States; that they are in the strictest sense of the term *National militia raised in an emergency for National defense.* So long as the Government is held in the iron grip of those two statutes, really one act, it is simply child's play for it to contend that the *National Militia,* drafted out of the "Unorganized Militia," has been deprived of its *organic constitutional character* as such, because certain administrative officials have had the *audacity,* in defiance of the Constitution and the laws, to label it, "a National Army," a phantom body that has no existence in law or fact.

THE SINGLE QUESTION PRESENTED BY THIS RECORD.

Can a member of the National Militia, lawfully conscripted under that part of Sec. 8, Art. I, which declares that "The Congress shall have power . . . to provide for calling forth the [National] Militia to execute the laws of the Union, suppress insurrections and repel invasions," be lawfully transported, against his will, over three thousand miles of torpedo-sown seas to the battlefields of Europe by a mere military order of the President, as Commander-in-Chief, unsupported by any pretended authority from the American people, expressed either through an act of Congress or through any act purporting to amend the Constitution itself?

EXEMPTION OF THE MILITIA FROM SERVICE ABROAD THE MOST ANCIENT IMMUNITY KNOWN TO THE ENGLISH CONSTITUTION.

The ancient landfyrd, the militia of the English shire, is as old as the shire system itself. The militia thus drawn from the shires was the only military force that Alfred the

Great could "call forth" against the Danes; it was the only military force that Harold could "call forth" to oppose the Norwegians in the great fight at Stamford-bridge; it was the only military force that Harold could "call forth" to oppose the Norman invasion. The county military system, known as the militia, survived the Norman Conquest unimpaired (Stubbs, *Select Charters*, pp. 153–4); it is an existing institution at the present time. Throughout its entire history, embracing the ten centuries and more that divide the accession of Ecgberht from that of George V, *the English militia has always been exempt from service abroad.* By the great statute of I Edw. III, c. 5, *purely declaratory*, it was provided that the militia could only be used at home for national defense "*as has been used in times past for the defense of the realm.*" Down to 1786, the year before the meeting of the Federal Convention, it was not legally possible to take the English militia over the border into Scotland. In 1786 that was made possible by the Act of 26 Geo. III, c. 107, Sec. 95, concerning the militia, in which it was provided that "*neither the whole nor any part shall be ordered out of Great Britain.*" In the words of the Enc. Brit. (9 ed.): "The militia of the United Kingdom consists of a number of officers and men maintained for the purpose of augmenting the military strength of the country in case of imminent national danger or great emergency. In such a contingency the whole or any part of the militia is liable, by proclamation of the sovereign, TO BE EMBODIED, *that is to say, placed in active service within the confines of the United Kingdom.*" Mr. Dicey, one of the most eminent, certainly the most business-like and practical commentator on the modern English constitution, says *in his edition of 1908:* "EMBODIMENT *indeed converts the militia for the time being into a regular army,* THOUGH AN ARMY WHICH CAN NOT BE REQUIRED TO

SERVE ABROAD." The court will please note that as late as 1908 the famous author of *The Law of the Constitution*, declared that even after the English militia had been "*embodied*," *i. e.*, converted "*for the time being into a regular army*," it was still *as exempt from service abroad as it had been in the days of Ecgberht, Alfred, and Harold.* And here the fact should be emphasized that "Before the Crimean War *it was illegal to send the militia abroad even with its own consent;* during the war, however, a short act of Parliament was passed making it legal for militia units, *if they volunteered*, to serve in Gibraltar and Malta. This power was still further increased in 1898, when it was made legal for militia units to serve *with their own consent* at any place out of the United Kingdom." *The Times History of the War in South Africa*, vol. vi, p. 262.

ENGLISH CONSTITUTION AMENDED AFTER THE PRESENT WAR BEGAN IN ORDER TO MAKE POSSIBLE THE SENDING OF THE ENGLISH MILITIA TO FRANCE.

And so after the present war began, in order to make possible the transportation of the English militia, "*embodied in a regular army*," across the Channel into France, *where it had never been seen before*, it became necessary for the Omnipotent Parliament so *to amend the English Constitution as to permit the taking of the militia beyond the realm!* We are grateful to this court for its lucid statement of that all-important fact in the history of the English Constitution recently made in the *Draft Cases*, in this form: "So, also, it is wholly unnecessary to explore the situation for the purpose of fixing the sources whence in England it came to be understood that the citizen or the force organized from the militia, as such could not, without their consent, be compelled to render service in a foreign country, since there is no room to contend that such principle ever rested upon any challenge of the right of Parliament to impose

compulsory duty upon the citizen to perform military duty wherever the public exigency existed, whether at home or abroad. This is exemplified by the present English Service Act (Military Service Act, January 27, 1916, 5 and 6 Geo. V, Chap. 104, p. 367, amended by the Military Service Act of May 25, 1916, 2d. Sess., 6 and 7 Geo. V, Chap. 15, p. 33)." By those Acts, *passed in 1916*, the English Constitution was so amended as to make possible the sending of the English Militia to France.

Of course we do not contend for a moment that the foregoing, *the only allusion to service abroad made by this court in the Draft Cases, was an adjudication*, because no question concerning service abroad was before this court in those cases *in any form*. The only question before the court in those cases (to use its own words) was this: "They all defended by denying that there had been conferred by the Constitution upon Congress *the power to compel military service by a selective draft*, and if such power had been given by the Constitution to Congress, the terms of the particular act, for various reasons, caused it to be beyond the power and repugnant to the Constitution. *The cases are here for review because of the Constitutional question thus raised.*" To the judgment of the court upon the only question before it—*the constitutional right of Congress to pass a Conscription law for home defense*—we heartily and humbly subscribe. Admitting the constitutionality of the act in question, the contention here is that the National Militia, duly conscripted under said act, are endowed with an express constitutional exemption from service abroad, *a question this court could not possibly have considered in the Draft Cases for the conclusive reason that no such question was before it.* Therefore, in the discussion of this case, we are absolutely untrammeled by any general observations this court may

have made in the Draft Cases, entirely outside of the one question actually before it in those cases.

This court knows that before the Draft Cases were heard counsel for appellant informed it, in a brief filed as Amici Curiæ, that his case, *involving the vital constitutional question of the immunity of the National Militia from service abroad* (a question not presented in any form in any one of the Draft Cases), was on its way to this court as a test case. For that reason appellant's counsel appealed to this court not to prejudice, by anything which might be said in the Draft Cases, the vital question now presented by this record, *before this appellant could have his day in court, and be fully heard here as to the same,* With a delicacy and consideration for which we are grateful this court responded to our request, making but one allusion to the subject of military service abroad. That allusion, quoted already, merely states the historical fact—*very important to this appellant*—that it was necessary for the Parliament in 1916 so to amend the English Constitution as to make possible the sending of the English militia to France after the present war began. And yet with these record facts staring them in the face counsel for the Government, reckless of human life and liberty, have given notice, in this case, of a frivolous and unworthy motion "to dismiss or affirm," basing it upon *the sole ground* that this court has *prejudged and foreclosed* this vital constitutional question, *involving not only the lives and liberties of half a million of American citizens, but the very life of the Constitution itself*—in the Draft Cases in which no such question was involved. The opinion delivered by this court in those cases conclusively refutes an indefensible imputation that should never have been made. Counsel for the Government should remember that this court, even in the most trivial case, "never strikes until it hears"; it guarantees to every citizen, however humble, his day in court. And here it is

important to note that in this "motion to dismiss or affirm," the Government announces its purpose to make the grotesque contention that this appellant was not conscripted as a member of the *National Militia because* he was conscripted "into *the National Army* of the United States," a phantom body which, as we have demonstrated already, has no existence either in the Constitution or laws of the United States.

EXEMPTION OF NATIONAL MILITIA FROM SERVICE ABROAD CAN ONLY BE REMOVED FROM THE AMERICAN CONSTITUTION BY A CONSTITUTIONAL AMENDMENT.

Animated by that high sense of "constitutional morality" (a phrase made famous by Mr. Grote, Hist. of Greece, IV, 81), that has ever characterized them, the English people, the moment it became necessary to abolish the ancient constitutional exemption of the militia from service abroad, *amended their Constitution through the acts of the Omnipotent Parliament* TO WHICH THIS COURT HAS SO POINTEDLY REFERRED. Only *by a like process of amendment* can the ancient constitutional exemption of our National Militia from service abroad, *anchored by the fathers in Sec. 8, Art. I, in the Constitution of 1787, be wiped out.* The primary purpose of this argument will be to convince the court that the Government is here for the single purpose of inducing it to remove from the Constitution of the United States, *under the cloak of judicial construction*, a most sacred and ancient provision, which can only be lawfully removed by the American people acting through the authorized process of constitutional amendment, a process which our law-loving English brethren have neither neglected nor forgotten.

SAFEGUARDS EMBODIED IN THE ENGLISH CONSTITUTION STRENGTHENED BY THE AMERICAN INVENTION KNOWN AS "CONSTITUTIONAL LIMITATIONS."

The English and American constitutional system, considered as a single progressive and unbroken develop-

ment, has been called a body of law "broadening down from precedent to precedent." Its very soul is enshrined in the ancient legal maxim—"A counsellor ought not to be heard who speaks against precedent" (*Counsellor nest destre oye que parle enver le president*). Out of that process has been evolved in England what is known as "the law of the land," a purely English creation which has no prototype in the constitutional history of any other country. As Lieber has expressed it, "The guaranty of the supremacy of the law leads to a principle which, so far as I know, has never been attempted to transplant from the soil inhabited by Anglican people, and which, nevertheless, has been in our system of liberty, *the natural production of a thorough government of law as contradistinguished to a government of functionaries.*" *Civil Liberty and Self-Government*, 91. The jurists and statesmen who replanted the English constitutional system on this soil, distrustful even of the safeguards of the ancient system, invented what they called "constitutional limitations," wherein all ancient liberties of the citizen were first redefined and then expressly guarded against encroachments upon the part of "*functionaries*," legislative, executive or judicial.

HOW THE ANCIENT IMMUNITY OF THE ENGLISH MILITIA FROM SERVICE ABROAD WAS IMBEDDED IN THE CONSTITUTION OF THE UNITED STATES.

Each of the original thirteen States organized bodies of State militia after the English model. "Militia musters" became the rule in the States as in the mother country. But when the Convention of 1787 met those who may be called the Nationalists, with Washington at their head, contending that the State militia had proven to be "*inefficient under the Confederation*," demanded the creating of a *National Militia system*, entirely apart from the

State systems, which should be under the exclusive control of the new Federal Government. See Madison Papers, p. 730 and p. clxxxii, Gilpin ed. The proposal to create a National Militia was made by George Mason, who, on August 18, "introduced the subject regulating the militia. He thought such a power necessary to be given to the general government. He hoped there would be no standing army in time of peace, unless it might be for a few garrisons. The militia ought, therefore, to be the more effectually prepared for the public defense. Thirteen States will never concur in any one system, if the disciplining of the militia be left in their hands. If they will not give up the power over the whole, they probably will over a part as select militia." In supporting Mason's proposition Pierce Butler "urged the necessity of submitting the whole militia to the general authority, which had the care of the general defense; and Charles Pinckney, in contending that "Congress should have power to regulate the militia," said: "For a part to be under the general and a part under the State governments would be an incurable evil. He saw no room for such distrust of the general government." John Langdon next arose and said: "He saw no more reason to be afraid of the general government than of the State governments. He was more apprehensive of the confusion of the different authorities on the subject, than of either." The last word in favor of the creation of a National Militia was then spoken by James Madison, who said he "thought the regulation of the militia naturally appertained to the authority charged with the public defense. It did not seem, in its nature, to be divisible between two distinct authorities. If the States would trust the general government with the power over the public treasure, they would, from the same consideration of necessity, grant it the direction of the public force. Those who had a full view of the public situation

would, from the sense of the danger, guard against it. The States would not be separately impressed with the general situation, nor have the due confidence in the concurrent exertions of each other." In the course of the debate "General Pinckney mentioned a case, during the war, in which a dissimilarity in the militia of different States had produced the most serious mischiefs. Uniformity was essential. *The States would never keep up a proper discipline of the militia.*" Madison Papers, pp. 1355–1363.

The opposition to the creation of a National Militia was led by Gerry, who "was against letting loose the myrmidons of the United States on a State without its own consent." In opposing the new creation he said he "thought this the last point remaining to be surrendered. If it be agreed to by the Convention, the plan will have as black a mark as was set on Cain. He had no such confidence in the general government as some gentlemen possessed, and believed it would be found that the States have not." Dickinson, with equal vehemency, said: "We are come now to a most important matter—that of the sword. His opinion was that the States never would, nor ought to, give up all authority over the militia. He proposed to restrain the general power to one-fourth part at a time, which by rotation would discipline the whole militia." In a more conservative temper Ellsworth said he "was for going as far, in submitting the militia to the general government, as might be necessary. . . . The whole authority over the militia ought by no means to be taken away from the States, whose consequence would pine away to nothing after such a sacrifice of power. He thought the general authority could not sufficiently pervade the Union for such a purpose, nor could it accommodate itself to the local genius of the people. *It must be vain to ask the States to give the militia out of their hands.*" Madison Papers, pp. 1350–1362.

Thus was the issue sharply defined in the Convention between two factions—the States rights faction contending, in the words of Ellsworth, that it was "vain to ask the States to give the militia out of their hands;" the Nationalists urging, in the words of Pierce Butler, "the necessity of submitting the whole militia to the general authority which had the care of the general defense." The deadlock which thus arose was broken on this, as on many other occasions, by a compromise arranged by a grand committee of the States. (Elliot, V 445.) The partial victory won by the States rights faction was embodied in the concession that the States should continue to retain their militia systems, *subject to a certain degree of Federal control.* That concession was thus expressed: "The Congress shall have power . . . to provide for organizing, arming, and disciplining the [State] militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress."

By that concession thus made to the States rights party in the Convention of 1787, under which the continued existence of the State militia was guaranteed, subject to a certain amount of Federal control—the Nationalists purchased the right to have a National Militia, *to be created by Congress*, entirely free from State control. That concession was thus expressed: The Congress shall have power . . . to provide for calling forth the [national] militia to execute the laws of the Union, suppress insurrections and repel invasions."

The first time Congress ever exercised that power was when it "called forth" the National Militia under the Conscription Act of March 3, 1863, for the expressly declared purpose of suppressing an insurrection.

The second time Congress exercised that power was when it "called forth" the National Militia under the Conscription Act of May 18, 1917, a substantial reproduction of the first, *so far as conscription is concerned.* Despite the fact there is no preamble to the last act it is equally clear that the National Militia (*now craftily styled a National Army by certain unauthorized officials in order to obscure its real character*), may be used "to execute the laws of the Union, suppress insurrections and repel invasions," but for no other purposes.

In limiting the use of the National Militia to the three purposes just stated the Convention had of course uppermost in its mind *the exemption of the English militia from service abroad,* which had been a vital part of the English constitution for a thousand years prior to our severance from the mother country. Every member of the Convention knew that the English militia could not be taken across the Channel, that it could only be used AT HOME "*to repel invasions.*" Therefore that ancient formula was transplanted into the Constitution of the United States in the belief, no doubt, that every school boy in the land would understand its meaning and its history.

THE FIRST RECOGNITION BY THIS COURT OF TWO DISTINCT SYSTEMS OF MILITIA, ONE STATE, ONE NATIONAL.

When this subject came for the first time before this court in Houston *v.* Moore, 5 Wheat. 7, the two distinct systems of militia—the one created and maintained by the States, the other created and maintained by the Federal Government—were recognized and defined in terms so clear and distinct as to preclude all doubt upon the subject. Mr. Hopkins for the plaintiff in error said in his brief: "The power to govern the militia thus called forth, and employed in the service of the United States, is ex-

clusively in the National Government. *A National Militia grew out of the federal constitution, and did not previously exist. It is in its very nature one indivisible object, and of the utmost importance to the support of the federal authority and government,*" citing Livingston *v.* Van Ingen, 9 Johns. Rep. 507, 565, 575. In accepting that view, and in drawing the line between the new National Militia and the pre-existing State militia, the court said: "But as State militia, the power of the State governments to legislate on the same subjects, having existed prior to the formation of the constitution and not having been prohibited by that instrument, it remains with the States, subordinate nevertheless to the paramount law of the general government, operating upon the same subject. On the other side, it is conceded, that after a detachment of the [State] militia have been called forth and have entered into the service of the United States, the authority of the general government over such detachment is exclusive. This is also obvious. *Over the National Militia, the State governments never had, nor could have jurisdiction. None such is conferred by the Constitution of the United States; consequently none can exist.* . . . It is obvious that there are two ways by which the militia may be called into service; the one is under State authority, *the other under the authority of the United States.*"

In analyzing that case it is all-important to remember that the question directly involved was *the construction of the Act of February 28, 1795.* As stated by the court itself: "The act of 2d of May, 1792, which is reenacted almost *verbatim* by that of the 28th of February, 1795, authorizes the President of the United States, in case of invasion, or of imminent danger of it, or when it may be necessary for executing the laws of the United States, or to suppress insurrections, to call forth SUCH NUMBER OF THE

MILITIA OF THE STATES [there were no attempts in those early days to *create a National Militia as such*] most convenient to the scene of action, as he may judge necessary, and to issue his orders for that purpose to such officers of the militia as he shall think proper. It prescribes the amount of pay and allowances of the militia so called forth, and employed in the service of the United States, and subjects them to the rules and articles of war applicable to the regular troops."

THE FIRST RECOGNITION BY THIS COURT OF EXEMPTION FROM SERVICE ABROAD.

The case of Houston *v.* Moore was followed in due time by that of Martin *v.* Mott, 12 Wheat. 19 (1827), in which a new question, involving the construction of the Act of February 28, 1795, was presented here. That new question was this: Was an exclusive authority vested in the President to decide whether the exigencies had actually arisen, which were contemplated in the Constitution, and in said Act of 1795, authorizing him to call forth the State militia to execute the laws of the Union, suppress insurrections and repel invasions?" In reaching the conclusion that the exclusive authority so to decide was vested in the President, this court settled a graver question. *It decided that State militia in the service of the United States, as well as National Militia, are exempt from service abroad.* In the words of the court: "The power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. One of the best means to repel invasion is to provide the requisite force for action *before the invader himself has reached the soil.* . . . A free people are naturally jealous of the exercise of military power, and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude. But it is not a power which can be executed without

corresponding responsibility. *It is, in its terms,* A LIMITED POWER, *confined to cases* OF ACTUAL INVASION, OR OF IMMINENT DANGER OF INVASION." And so, this court gave in 182- a lucid and comprehensive definition of the ancient English formula "*to repel invasions.*" Then it was settled once for all that the militia of the United States, no matter whether State or national, can only be called forth to "repel invasions;" and that "the best means to repel invasion is to provide the requisite force for action *before the invader himself has reached the soil.*" IN OTHER WORDS, AN INVASION CAN ONLY BE REPELLED BY MEN STANDING ON THE SOIL OF THEIR OWN COUNTRY.

ATTORNEY GENERAL WICKERSHAM'S MASTERFUL OPINION OF 1912 UPHOLDING THE EXEMPTION FROM SERVICE ABROAD AND PRESIDENT TAFT'S ACCEPTANCE OF IT AS FINAL.

Eighty years after this court had, in Martin *v.* Mott, 12 Wheat, 19, 27, solemnly affirmed the exemption of the militia, State and national, from service abroad, certain lawless people, who claimed that such exemption had become an inconvenience by reason of the territorial expansion incident to the Spanish-American War, undertook *to contrive a subterfuge* whereby it might be destroyed through Congressional legislation. With that end in view, the Act of January 21, 1903, was amended by the Act of March 27, 1908, in such a way as to provide that "*the militia so called shall continue to serve during the term so specified, either within* OR WITHOUT THE TERRITORY OF THE UNITED STATES."

By that cunning device such evil-minded persons attempted to make Congress confer upon the President *the power to rob the militia of its constitutional exemption from service abroad,* in defiance of the elementary principle that the legislative department of the government cannot confer upon the Executive a power it is expressly forbidden to exercise itself. When such device was sub-

mitted by President Taft to Attorney General Wickersham, a learned lawyer, with a thorough knowledge of English and American constitutional law, he trampled upon it in an elaborate official opinion delivered under his oath of office and dated Feburary 17, 1912, in which, among other things, he said:

> "The Constitution, which enumerates the exclusive purposes for which the militia may be called into the service of the United States, affords no warrant for the use of the militia by the general government, except to suppress insurrection, repel invasions, or to execute the laws of the Union. . . . This has always been the English doctrine, and in some instances acts of Parliament have expressly forbidden the use of the militia outside of the Kingdom. *Our ancestors, who framed and adopted our Constitution and early laws, got their ideas of a militia, its nature, and purposes from this, and must be taken to have intended substantially the same military body.* . . . If authority is needed for the conclusion here reached, the following may suffice: In Ordronaux, Constitutional Legislation, page 501, it is said:
>
> " 'The Constitution distinctly enumerates the three exclusive purposes for which the militia may be called into the service of the United States. These purposes are: First, to execute the laws of the Union; second, to suppress insurrection; and, third, to repel invasions.'
>
> "These three occasions, representing necessities of a strictly domestic character, plainly indicate that the services required of the militia can be rendered ONLY UPON THE SOIL OF THE UNITED STATES OR OF ITS TERRITORIES. . . . IN THE HISTORY OF THIS PROVISION OF THE CONSTITUTION THERE IS NOTHING INDICATING THAT IT WAS EVEN CONTEMPLATED THAT SUCH TROOPS SHOULD BE EMPLOYED FOR PURPOSES OF OFFENSIVE WARFARE OUTSIDE THE LIMITS OF THE UNITED STATES. And it is but just to infer that the enumeration of the specific occasions on which alone the militia can be called into the service of the general

government was intended as a distinct limitation upon their employment." . . .

And in Von Holtz, Constitutional Law, page 170, it is said, "the militia cannot be taken out of the country." . . .

It is true that the Act of January 21, 1903, as amended by the Act of March 27, 1908 (35 Stat. 399), provides:

"That whenever the President calls forth the organized militia of any State, Territory, or of the District of Columbia to be employed in the service of the United States he may specify in his call the period for which such service is required, and the militia so called shall continue to serve during the term so specified, either within or without the territory of the United States, unless sooner relieved by order of the President."

But this must be read in view of the constitutional power of Congress to call forth the militia only to suppress insurrection, repel invasions, or to execute the laws of the Union. CONGRESS CANNOT BY ITS OWN ENACTMENT ENLARGE THE POWER CONFERRED UPON IT BY THE CONSTITUTION; AND IF THIS PROVISION WERE CONSTRUED TO AUTHORIZE CONGRESS TO USE THE ORGANIZED MILITIA FOR ANY OTHER THAN THE THREE PURPOSES SPECIFIED, IT WOULD BE *UNCONSTITUTIONAL*. . . .

I think that the constitutional provision here considered not only affords no warrant for the use of the militia by the General Government, except to suppress insurrection, repel invasions, or to execute the laws of the Union, but, by its careful enumeration of the three occasions or purposes for which the militia may be used, IT FORBIDS SUCH USE FOR ANY OTHER PURPOSE; and your question is answered in the negative.

Respectfully,

GEORGE W. WICKERSHAM.

TO THE SECRETARY OF WAR.

After citing in that opinion the decisions of the Supreme Court of the United States (Houston *v.* Moore, 5 Wheat. 1, and Martin *v.* Mott, 12 Wheat. 19, 27) as irrevocably settling the exemption of the militia from service abroad, the Attorney General exposed, with striking emphasis, the emptiness of the contention that, *although the Congress is expressly forbidden to authorize the sending of the militia, National or State, abroad, it may authorize the President to do so.* Speaking of the act before him which attempted to authorize the President to use the militia "*either within or without the territory of the United States,*" he said: "*If this provision were construed to authorize Congress to use the organized militia for any other than the three purposes specified, it would be unconstitutional.*" Thus, in advance, he put the stamp of nullity upon any clause or phrase in the Conscription Act of May 18, 1917, which may be so construed as to express such an unconstitutional purpose. President Taft, a famous jurist, accepted the Attorney General's opinion as final and conclusive.

EXEMPTION IN QUESTION AGGRESSIVELY AFFIRMED BY PRESIDENT WILSON IN FOUR SPEECHES DELIVERED IN 1916.

After the foregoing opinion of Attorney General Wickersham had become the law of the Department of Justice, and as such binding in this vital matter upon President Wilson, he affirmed it, with great emphasis, in four speeches delivered in January and February, 1916, when he was called upon to explain why he could do no more for the development of the State militia, now euphoniously called the National Guard.

In an address delivered at New York, January 27, 1916, he said: "I believe that it is the duty of Congress to do very much more for the National Guard than it has ever done heretofore. I believe that that great arm *of our*

national defense should be built up and encouraged to the utmost; *but, you know,* gentlemen, *that under the Constitution of the United States* the National Guard is under the direction of more than twoscore States; that it is not permitted to the National Government directly to have a voice in its development and organization; *and that only upon occasion of* ACTUAL INVASION *has the President of the United States the right to ask those men to leave their respective States.*" In an address delivered at Cleveland, Ohio, January 29, 1916, he said: "The President of the United States has not the right to call on these men [the National Guard] except in the case *of actual invasion*, and, therefore, no matter how skillful they are, no matter how ready they are, they are not the instrument for immediate National use." In an address delivered at Milwaukee, January 31, 1916, he said: "The National Guard, fine as it is, *is not subject to the orders of the President of the United States.* It is subject to the orders of the governors of the several States, *and the Constitution itself* says that the President has no right to withdraw them from their States even, *except in the case of actual invasion of the soil of the United States.*" In an address delivered at Topeka, Kansas, February 2, 1916, he said: "*The Constitution of the United States* puts them [the National Guard] under the direct command and control of the governors of the States, not of the President of the United States, and the *national authority has no right to call upon them for any service outside their States unless the territory of the Nation* IS ACTUALLY INVADED." The Constitution of the United States has not been amended since those very emphatic declarations were made.

WIDE SCOPE OF THIS COURT'S JUDICIAL KNOWLEDGE.

Before completing its epoch-making work, the Federal Convention of 1787 confided the guardianship of the new

Constitution to this court, arming it at the same time with such powers of defense as no other court had ever possessed before. In the exercise of that guardianship, this court does not sit here upon the watchtower with its judicial eyes blindfolded; upon the contrary it has armed itself with a judicial knowledge wide enough to enable it to survey the history of the past and present, and to look, as far as may be, into the possibilities of the future. This court has determined that it will take judicial notice of whatever is generally known within its jurisdiction; of the entire field occupied by our constitutional and political history, embracing the legal and political institutions of such dependencies as Porto Rico; of all historical facts necessary in a given case to determine the intent of the legislature in passing a law; of the fact even that the raising of citrus fruits is one of the great industries of a particular State; of the extent of the present European War. Keene *v.* McDonough, 8 Pet. 398; Bank of Augusta *v.* Earle, 13 Pet. 519; The Divina Pastora, 4 Wheat. 52; Brown *v.* Peper, 91 U. S. 37; Prize Cases *v.* Black, 635; Sparrow *v.* Strong, 3 Wall. 97; U. S. *v.* Jackson, 104 U. S. 41; Neely *v.* Henkel, 180 U. S. 109; Ponce *v* Roman C. A. Church, 210 U. S. 296; Sligh *v.* Kirkwood, 237 U. S. 52; United States *v.* Hamburg-Amerikanische Co., 239 U. S. 466. Special emphasis is thus given to the scope of this court's judicial knowledge because, before it can lend its sanction to the startling claim to autocratic power over the National Militia now set up in this case *for the first time by the Executive Department of the Government*, it must recognize the fact that that Department has recently taken to itself such general powers and authorities as destroy, in substance if not in form, the ancient equilibrium between the three departments as originally established by the Constitution. This court, through its judicial knowledge, must recog-

nize the fact, which everybody else knows, that since the declaration of war, the Executive Power has drawn to itself such a mass of authorities and jurisdictions as to make the ancient system as founded in 1789 almost unrecognizable. It may be said without the slightest exaggeration that the American Commonwealth as founded in 1789 is to-day "like an old man who still wears, with attached fondness, clothes in the fashion of his youth; what you see of him is still the same; what you do not see is wholly altered."

THIS COURT HAS EMPHATICALLY DELCARED THAT THE PRETENSION THAT WAR SUSPENDS ANY PROVISION OR GUARANTY OF THE NATIONAL CONSTITUTION "LEADS DIRECTLY TO ANARCHY OR DESPOTISM."

In the presence of such organic changes, recognized as existing by every reasoning American, is this court prepared to sanction by its judgment the final step? Is it prepared to say that a half million of American youths, conscripted as National Militia under Sec. 8, Art. I, of the Constitution, may be sent to fight on the banks of the Rhine, the Seine, the Danube, the Nile, the Euphrates by a mere military order of the President as Commander-in-Chief, such order being entirely unsupported by any authority from the American people, expressed either in the form of a valid provision in an act of Congress or in that of a Constitutional amendment? If those who advocate the granting of this unprecedented power to the President claim that the profound Constitutional change it involves *is the necessary result of a state of war*, such a pretention can be crushed in a moment by the following from the great judgment rendered by this court in *Ex parte Milligan*, 4 Wall. 2, 142: "The Constitution of the United States is a law for rulers and peoples, EQUALLY IN WAR AND PEACE, and covers with the shield of its protection all classes of men, *at all times, and*

under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. SUCH A DOCTRINE LEADS DIRECTLY TO ANARCHY OR DESPOTISM, BUT THE THEORY OF NECESSITY ON WHICH IT IS BASED IS FALSE." In that case this court also said: "This nation, as experience has proved, cannot always remain at peace and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; *and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate.*" If this court should think even for a moment of arming the President, as Commander-in-Chief, with the autocratic power to send the National Militia forth, by a mere military order, to fight in any part of the world, we pray that it will pause long enough to consider how frightful "THE DANGERS TO HUMAN LIBERTY" will be if, in the time to come, "wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln." The mere thought of such a thing is enough to move a loyal and patriotic lover of the Constitution to tears!

GENESIS OF THE SUDDENLY CONSTRUCTED AND PREPOSTEROUS CONTENTION THAT THE NATIONAL MILITIA MAY BE SENT OUT TO FIGHT IN ANY PART OF THE WORLD BY A MERE MILITARY ORDER OF THE PRESIDENT AS COMMANDER-IN-CHIEF.

From what has now been said it clearly appears (1) that in 1827 this court in a unanimous judgment declared that the militia, State and National, can only be used for one of the three purposes clearly defined in Sec. 8, Art. I

of the Constitution; that to "repel invasions" means "to provide the requisite force for action, *before the invader himself has reached the soil;*" or, in the words of Ordronaux, "the services required of the militia can be rendered *only upon the soil of the United States or its Territories;*" (2) that in 1912, when the expansionists, after the Spanish-American War, attempted to destroy the Constitutional exemption in question by *a subterfuge embodied in Congressional legislation*, the entire subject was reexamined by Attorney General Wickersham, who trampled upon the cunning device then brought forward, declaring that the militia, both State and National, is exempt from service abroad; "that the services required of the militia can be rendered *only upon the soil of the United States or its Territories;*" (3) that President Taft, an eminent and experienced constitutional lawyer, at whose instance the Wickersham opinion was prepared, accepted its conclusions as final and unquestionable; (4) that in 1916 President Wilson, recognizing the Wickersham opinion as the law of the Department of Justice and as such binding upon him, solemnly reaffirmed its conclusions in four speeches, now in print, delivered in the months of January and February, 1916. Such were the *legal and moral obstacles* that confronted those who, upon the declaration of war, in April, 1917, suddenly conceived the idea that it was possible to send millions of conscripted American militia to the battlefields of Europe, not only in open defiance of the express provisions of the Constitution as construed by this court, but in open defiance of the Monroe Doctrine, almost as sacred as the Constitution itself. Those who proposed such a starting revolution in our polity, at once constitutional and political, frankly admitted *that there was no precedent whatever to justify their action.* The President, as their spokesman, said in his Flag Day address, of June 14, 1917:

"*American armies were never before sent across the seas.*" In 1916 Major General Leonard Wood, who now holds this appellant in his military custody, until he can be sent abroad or delivered by this court, said in a very forceful book entitled "*Our Military History, Its Facts and Fallacies,*" published in that year that "Our policy is not one of aggression, but one which looks only to a secure defense. Consequently the arrangements for our military establishment should be limited to the needs of *a secure and certain national defense against foes which may be brought against us.*" After reviewing the histories of the War of the Revolution and the War of 1812, the author says that we have been compelled to fight all our wars WITH VOLUNTEERS, "*because the militia was not available for service outside of the United States.*" He then adds that we had so to conduct the Mexican War "*where the militia could not be used because of the constitutional limitation upon its employment outside of the United States*" (pp. 145–146).

In the presence of such difficulties, apparently insurmountable in a Constitutional Democracy, the question of questions was this: *How can "the law of the land" and the polity of the land be suddenly overthrown by* A SUBTERFUGE *that will be recognized as constitutional by the Supreme Court of the United States?* Who can point to a case in the entire history of civilization—ancient, medieval or modern—in which raw and untrained youths were taken from the field, the farm, the anvil, the plough, the counter and sent *by the hard hand of conscription, thousands of miles over sea for military service in far distant foreign lands?* When Rome determined to send Caesar to conquer Gaul, and there lay the foundations for modern France, the tribune Vatinius moved the sovereign assembly of Rome to send Caesar forth to do that work with what? Raw youths compelled to go by law? No. To Caesar was given for that perilous work, trained and

seasoned veteran legions, *every member of which was a volunteer*. See Ferrero, *Greatness and Decline of Rome*, vol. i, pp. 323, 349. When the time came for the British Empire to crush the Dutch Republics in South Africa what kind of troops were sent for that perilous work thousands of miles over sea? Did Great Britain send conscripted militia? No. She sent the flower of her veterans, *her Regular Volunteer Army forty-seven thousand strong*, under Sir Redvers Buller. In describing that splendid array of volunteer veterans the highest authority, quoted already, says: "Never had so completely equipped a force left the shores of England for a distant expedition over seas," vol. ii, p. 117. Every addition made to that force was composed of *volunteers*.

NO MAN SHOULD DARE TO JUGGLE WITH A VITAL PROVISION OF THE CONSTITUTION OF THE UNITED STATES UPON WHICH THE LIVES OF HALF A MILLION AMERICAN YOUTHS DEPEND.

In the presence of such difficulties, those of our citizens who had resolved that raw and untrained American youths should, *for the first time in the history of civilization*, be driven by the hard hand of law across a vast ocean in order to render military service on the battlefields of Europe, instituted a grand inquest into the history of the past in the hope of finding something like a precedent to justify an adventure so blood-curdling, so extraordinary. The outcome of that inquest, conducted by the most daring Americans who ever lived, was the discovery that during the War of 1812, after several governors had refused to permit the militia of their respective States to be used for the invasion of Canada *because of the constitutional exemption in question*, certain public men had attempted to construct *a cunning device* whereby members of the militia could be forced to join the Regular Army in defiance of that part of Sec. 8, Art. I, under discussion in this case. The essence of the contention,

then as now, was that under the clause that authorizes Congress "To raise and support armies"—that is, *regular armies based on the volunteer system*—a conscription act might be passed to "*fill the ranks of the Regular Army by compulsion*," such conscripts, as a part of the Regular Army, to be subject, of course, to service abroad. The drawback to the discovery of that *cunning device* was its untimely and ignoble death. The history of the times fortunately disclosed the fact that after it had been presented to Congress in a bill backed by the Secretary of War, Monroe, the weakest statesman of his epoch, it was, on December 9, 1814, trampled to death in the House of Representatives *on account of its unconstitutionality*, in a great speech by Daniel Webster that will live forever. And yet, undaunted by its fate, that dead heresy was taken up out of a long forgotten and dishonored grave, in which it had slept for more than a century, in order to be employed as the means by which our National Militia may be unlawfully transported across the seas during the war now in progress.

In order to give to such discredited device some kind of respectability, a potent sponsor had to be found who would be willing to stand for it before the American people. Such a sponsor was found, and when he revamped the old device, it reappeared in this form—"While the President is Commander-in-Chief, in the Congress resides the authority 'to raise and support armies,' and 'to provide and maintain a navy,' and 'to make rules for the government and regulation of the land and naval forces,' and as a safeguard against military domination, the power to raise and support armies is qualified by the provision that 'no appropriation of money to that use shall be for a longer term than two years,' *otherwise his power is unlimited.* The Congress is to prescribe the military organization and provide

the military establishment, fix numbers, regulate equipment, afford maintenance, and for these purposes appropriate such amounts of money as it thinks necessary." Such is the intellectual pedigree of the ancient and thoroughly discredited stalking horse with which we will be confronted in this case! While the potent sponsor who last mounted it, admitted in a dim and distant way that "*It is true that the proposal, in 1814, of Monroe as Secretary of War to resort to conscription, was vigorously opposed, as unconstitutional,*" by a strange forgetfulness he neglected to add that such proposal was trampled to death on December 9, 1814, and cast into the forgotten grave in which he found it by Daniel Webster, the unbendable patriot and ever-faithful expounder of the Constitution, who never, in peace or war, was tempted to mislead his countrymen as to its true meaning. In order to remedy the grave omission in question the essence of Webster's speech will now be presented to this court.

DANIEL WEBSTER'S GREAT SPEECH OF DECEMBER 9, 1814, TRIUMPHANTLY VINDICATING THE EXEMPTION FROM SERVICE ABROAD SET UP IN THIS CASE.

Did it ever enter into the mind of an American legislator to propose in the Congress of the United States *a conscription law* under that clause of the Constitution which authorizes that body "To raise and support armies," *so that those so conscripted could be incorporated in the ranks of the regular or volunteer army and taken with it beyond the territorial limits of the United States?* Yes, such a measure was offered in the House of Representatives during the War of 1812; and on December 9, 1814, Daniel Webster, who was much nearer to the makers of the Constitution than we are,* crushed it in an oration that

*When Webster's great speech was made the Constitution was but twenty-five years old; and of the founders of the Republic, Jefferson, John Adams, Madison, Marshall, Charles Pinckney, Charles Cotesworth Pinckney, Rufus King, Gouveneur Morris, John Langdon and Richard Dobbs Spaight, were still among the living. Edmund Randolph and Elbridge Gerry had just passed away.

will live forever. The great jurist in describing the character of the act said: "It is an attempt to exercise the power of forcing the free men of this country into the ranks of the army, *for the general purposes of the war*, under color of a military service. . . . The services of the men to be raised under this act are not limited to those cases in which alone this Government is entitled to the aid of the militia of the States. These cases are particularly stated in the Constitution—'to repel invasion, suppress insurrection, or execute the laws.' . . . The only section which would have confined the services of the militia proposed to be raised, within the United States, has been stricken out, and if the President should not march them into the Provinces of England at the North, or of Spain at the South, it will not be because he is prohibited by any provision in this Act. . . . *What is this, Sir, but raising a standing army out of the militia by draft, and to be recruited by draft, in like manner, as often as occasions require?* . . . In the present want of men and money, the Secretary of War has proposed to Congress a Military Conscription. *For the conquest of Canada the people will not enlist*, and if they would the treasury is exhausted and they could not be paid. Conscription is chosen as the most promising instrument, both of overcoming the reluctance to the service, and of subduing the difficulties which arise from the deficiencies of the exchequer. THE ADMINISTRATION ASSERTS THE RIGHT TO FILL THE RANKS OF THE REGULAR ARMY BY COMPULSION. . . . Congress having, by the Constitution, *a power to raise armies*, the Secretary contends that no restraint is to be imposed on the exercise of this power, except such as is expressly stated in the written letter of the instrument. In other words, that Congress may execute its powers by any means it chooses, unless such means are particularly prohibited."

Here we have, in all its horror, the pending contention that under the clause that authorizes Congress "*To raise and support armies*"—that is, regular armies based on the volunteer system—a conscription act may be passed to "*fill the ranks of the Regular Army by compulsion,*" such conscripts as a part of the Regular Army being subject of course to deportation to foreign lands.

In trampling the life out of that deadly and sophistical assault upon the Constitution he loved so well Webster said: "On the issue of this discussion, I believe the fate of this Government may rest. Its duration is incompatible, in my opinion, with the existence of the measures in contemplation. A crisis has at last arrived, to which the course of things has long tended, and which may be decisive upon the happiness of present and future generations. If there be anything important in the concerns of men, the considerations which fill the present hour are important. I am anxious above all things *to stand acquitted before God, and my conscience, and in the public judgments,* of all participation in the counsels which have brought us to our present condition and which now threaten the dissolution of the Government. When the present generation of men shall be swept away and that this Government ever existed shall be a matter of history only, I desire that it may then be known that you have not proceeded in your course unadmonished and unforewarned. Let it then be known that there were those who would have stopped you in the career of your measures, and held you back, as by the skirts of your garments, from the precipice, over which you are plunging, and drawing after the Government of your country. . . .

"*It is time for Congress to examine and decide for itself. It has taken things on trust long enough. It has followed Executive recommendation till there remains no hope of finding safety in that path.* . . .

"Persons thus taken by force and put into an army may be compelled to serve there, during the war, or for life. They may be put on any service, *at home or abroad, for defense or for invasion*, according to the will and pleasure of the Government. This power does not grow out of any invasion of the country, or even out of a state of war. It belongs to Government at all times, in peace as well as war, and is to be exercised under all circumstances according to its mere discretion. This, Sir, is the amount of principle contended for by the Secretary of War.

"Is this, Sir, consistent with the character of a free government? Is this civil liberty? Is this the real character of our constitution? No, Sir, indeed it is not. The Constitution is libelled, foully libelled. The people of this country have not established for themselves such a fabric of despotism. They have not purchased at a vast expense of their own treasures and their own blood a Magna Charta to be slaves. *Where is it wirtten in the Constitution, in what article or section is it contained that you may take children from their parents and parents from their children and compel them to fight the battles of any war in which the folly or the wickedness of government may engage in?* Under what concealment has this power lain hidden which now for the first time comes forth, with a tremendous and baleful aspect, to trample down and destroy the dearest rights of personal liberty? Who will show me any constitutional injunction which makes it the duty of the American people to surrender everything valuable in life, and even life itself, not when the safety of their country and its liberties may demand the sacrifice, *but whenever the purposes of an ambitious and mischievous government may require it?*

"If the Secretary of War has proved the right of Congress *to enact a law enforcing a draft of men out of the*

militia into the Regular Army, HE WILL AT ANY TIME BE ABLE TO PROVE QUITE AS CLEARLY THAT CONGRESS HAS POWER TO CREATE A DICTATOR. The arguments which have helped him in one case will equally help him in the other."

Thus it appears that the chimerical theory—based upon the assumption that Congress, under the power to "raise and support [volunteer] armies," can conscript into the Regular Army from the militia soldiers, *who may thus be defrauded of their constitutional exemption from service abroad*—is an ancient device constructed during the War of 1812, and trampled to death by Daniel Webster on December 9, 1814. Those who are now striving to lift that dead heresy out of a forgotten grave, in order that it may provide a way in which raw and untrained American conscripts may be dragged to the battlefields of Europe in defiance of the Constitution of their country, should be careful to explain how it was spurned by the patriot statesmen and jurists of 1814, who perfectly understood what the founders of 1787 really intended. Every fact to which we have referred in connection with this subject—past and present—is a part of the constitutional and political history of the United States and, as such, is within this court's judicial knowledge.

THE FORM IN WHICH THE VICIOUS DEVICE OF 1814 REAPPEARS IN THE CONSCRIPTION ACT OF MAY 18, 1917.

Probably with Webster's burning denunciation of the vicious device of 1814, designed for "*raising a standing army out of the militia by draft, and to be recruited by draft, in like manner, as often as occasions require*," ringing in their ears, the draftsmen of the Conscription Act of May 18, 1917, injected into it the following:

"SEC. 2. That the enlisted men required to raise and

maintain the organizations of the Regular Army and to complete and maintain the organizations embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength as by this Act provided, shall be raised by voluntary enlistment, *or if and whenever the President decides that they can not effectually be so raised or maintained, then by selective draft.*" When Attorney General Wickersham was called upon in 1912 to deal with substantially the same device in the form in which it appeared in the Act of January 21, 1903, as amended by the Act of March 27, 1908 (35 Stat. 399), he said:

"But this [the Act as amended] must be read in view of the constitutional power of Congress to call forth the militia only to suppress insurrection, repel invasions, or to execute the laws of the Union. Congress cannot by its own enactment enlarge the power conferred upon it by the Constitution; and if this provision were construed to authorize Congress to use the Organized Militia for any other than the three purposes specified, it would be unconstitutional. This provision applies only to cases where under the Constitution said militia may be used outside of our own borders, and was doubtless inserted as a matter of precaution and to prevent the possible recurrence of what took place in our last war with Great Britain, when portions of the militia refused to obey orders to cross the Canadian frontier.

I think that the constitutional provision here considered not only affords no warrant for the use of the militia by the General Government, except to suppress insurrection, repel invasions, or to execute the laws of the Union, but, by its careful enumeration of the three occasions or purposes for which the militia may be used, it forbids such use for any other purpose; and your question is answered in the negative." In other words,

this court must read the quoted portion of Sec. 2, of the Act of May 18, 1917, in view of the constitutional power of Congress to call forth the militia only to suppress insurrections, repel invasions, or to execute the laws of the Union, assuming, of course, that Congress *did not intend*, by the words employed, to violate that part of the Constitution. If, on the other hand, Congress did intend to violate it, then the attempt to do so is simply null and void. Certainly the Attorney General should bow cheerfully to a rule, *still the law of his Department*, and accepted as such, first by President Taft and then by President Wilson.

NATIONAL MILITIA FIRST CALLED FORTH BY THE CONSCRIPTION ACT OF MARCH 3, 1863. ITS DECISIVE PREAMBLE.

Not until March 3, 1863, did Congress deem it necessary to exercise the power to call forth the National Militia, as such, under that part of Sec. 8, Art. I, of the Constitution, which provides that "The Congress shall have power . . . to provide for calling forth the [national] militia to execute the laws of the Union, *suppress insurrections* and repel invasions." The draftsmen of that act did not leave any room for speculation as to the clause of the Constitution under which our first conscription law was enacted. In its preamble they settled that fact *so decisively* as to make it impossible for overastute constitutional metaphysicians to contend that the new troops were conscripted into a non-existent "National Army" under that part of Sec. 8, Art. I, which provides that "The Congress shall have power . . . to raise and support [volunteer] armies, but no appropriation of money to that use shall be for a longer term than two years." Not being humorous people, the draftsmen of the Act of March 3, 1863, did not attempt to conscript, *that is force by law*, men to join the Regular Army of the

United States into which no one but *a volunteer* has ever entered or can enter.

The records of the Federal Convention leave no possible room for doubt as to the fact that the clause authorizing Congress "to raise and support armies" means *volunteer armies like the British Regular Army*. That fact is fixed (1) by the presence of the substance of the Mutiny Act in the belly of the clause in question; (2) by a contemporaneous interpretation through statutes providing for the creation under that clause of the Regular Volunteer Army of the United States, statutes which have continued down to the present time. For a century and a quarter Congress has been declaring through its legislation providing for a Regular Volunteer Army *that it is "raised" under the clause in question*. So notorious is that fact that even military writers like Upton, not jurists, state the fact in this form: "Here were laid the foundations of the *volunteer system*, which attained its fullest development during our Civil War. The 'levies,' known later as 'volunteers,' were authorized under the *plenary power of Congress* to 'RAISE AND SUPPORT ARMIES,' and the power of appointing these officers was given to the President, to whom it obviously belonged, as the 'levies' WERE WHOLLY DISTINCT FROM THE MILITIA OR STATE TROOPS." Can anything then approach nearer to a mathematical demonstration than the process through which *we know* that the first Conscription Act of March 3, 1863, was enacted under the clause giving Congress the power "to provide for calling forth the [national] militia to execute the laws of the Union, suppress insurrections and repel invasions," and not under the clause giving that body the power "to raise and support [volunteer] armies, but no appropriation of money to that use shall be for a longer term than two years."

For the convenience of the court we have printed in the

Appendix hereto, in parallel columns, the only two conscription laws ever enacted by the Congress of the United States—the Act of May 3, 1863, and the Act of May 18, 1917. We know for certain that the former, *calling out the National Militia as such for the first time*, was enacted under that part of Sec. 8, Art. I, which provides that Congress shall have power "to provide for calling forth the [national] militia to execute the laws of the Union, suppress insurrections and repel invasions," *because its preamble so states in express terms.* As the second and last Conscription Act of May 18, 1917, *is a substantial reproduction of the first*, is it not as certain as any such thing can be that it was also enacted under the same clause, despite the fact that it has no preamble containing an express declaration to that effect. If that is so, then this argument is at an end. The Government cannot advance an inch with its preposterous contention unless it can demonstrate that the Conscription Act of May 18, 1917, *compelling military service by the force of law*, was enacted under that clause of the Constitution which authorizes the raising of *volunteer armies*, into which no one but *a volunteer has ever entered or can ever enter.*

FEDERAL CONVENTION OF 1787 SIMPLY REPRODUCED THE ENGLISH MILITARY SYSTEM AS IT EXISTED AT THAT DATE.

In order to enable Congress to reproduce the *Regular Volunteer Army and navy system* of the mother country as it existed in 1787, it was authorized "to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years [the Mutiny Act of 1688]; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces." That group of provisions (A) relate to a distinct subject—matter which has no connection whatever, as Upton well says, with the *militia systems*, national and State.

In order to enable Congress to utilize the preexisting systems of *State militia*, organized strictly on the English model, it was authorized (B) "to provide for organizing, arming and disciplining the [State] militia, and for governing such part of them as may be employed in the service of the United States, *reserving to the States, respectively*, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress."

Because every system of State militia had its origin in State authority and was, for that reason, subject to a certain extent to State control, it was determined by the Convention, at the instance of Washington, to create a National Militia, as such, entirely free from State control. In order to conciliate the State's rights faction in the Convention, bitterly opposed to such a Federal creation, it was agreed that the new National Militia should only be used *for three purposes*, which were clearly and distinctly defined. Under such conditions Congress was authorized (C) "to provide for calling forth the [national] militia to execute the laws of the Union, suppress insurrections and *repel invasions*." In that italicized phrase was anchored the thousand year old prohibition which absolutely denied to the English militia the right to serve abroad, even if it desired to do so. As we have proven already from the most exhaustive and authoritative history of the English military system—"*Before the Crimean War it was illegal to send the militia abroad, even with its own consent,*" vol. vi, p. 262, of *The Times History of the War in South Africa*, in seven volumes.

As our entire military system was thus drawn from the English Constitution, the constitutional clauses in which it was embodied must be construed according to the rule laid down by Marshall, C. J., in Burr's Case (4 Cranch

470), wherein, in defining the phrase, "levying war," he said: "It is used in a very old statute of that country whose language is our language and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it." With equal clearness and force the same rule has been restated by Mr. Justice Holmes, who, in Gompers *v.* United States, 233 U. S. 605, said: "But the provisions of the Constitution are not mathematical formulas having their essence in their form; *they are organic, living institutions transplanted from English soil.* Their significance is vital, not formal; it is to be gathered, not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. Robertson *v.* Baldwin, 165 U. S. 275, 281, 282." In the light of that lucid and historic rule it is perfectly easy to define the military powers that may be exercised by Congress after it has asserted its authority "to declare war." After that declaration has been made, Congress may so legislate as to develop and employ the three military elements which the Constitution has defined, *subject to all the conditions with which the Constitution has surrounded them.* That of course is what this court meant to say when it spoke *in general terms on that subject* through Mr. Chief Justice White in what are known as *The Draft Cases.* No more, no less. Certainly no jurist familiar with the history of our Constitution will undertake to say that a mere declaration of war by Congress casts all of the constitutional limitations upon the three great military agencies into a melting pot from which the President may extract the autocratic military power of an Oriental despot.

THREE INSURMOUNTABLE OBSTACLES IN THE PATH OF THE GOVERNMENT'S CONTENTION.

From what has now been said it clearly appears that

three insurmountable obstacles stand in the way of the Government's attempt to arm the President with the autocratic military power to send, without any valid authority from the American people in any form, the citizens conscripted under the Act of May 18, 1917, to fight in any part of the world. The first obstacle is embodied in the fact that the conscripts of 1917, like the conscripts of 1863, are *National Militia* called forth by Congress under that clause of the Constitution which, *in limiting their employment to three purposes*, expressly prohibits their removal beyond the territorial limits of the United States. The second obstacle is embodied in the fact that the contention that the Conscription Act of May 18, 1917, was really passed under that clause of the Constitution which authorizes Congress "to raise and support [volunteer] armies," and that, for that reason, such conscripts are in the same category with members of the *regular volunteer army*, is pitifully absurd for several reasons, chief among which are the following: In the first place this court knows historically, from the rule just cited, that the clause in question was intended only to authorize Congress to create *a regular volunteer army after the English model*, the presence in it of the Mutiny Act of 1688 being conclusive of that fact. Then if confirmation is needed we have a century and a quarter of unbroken legislation by Congress in which the *regular volunteer army* has been raised and supported under that clause. The clear and incontestable authority of Upton on that point may be repeated here. See *Military Policy of the United States*, p. 79. If counsel for the Government were possessed of a keener sense of humor, they would see at a glance that it is "an Irish bull" to contend that men may be conscripted, *that is, forced against their wills by the hard hand of law*, to join a Regular Army which is a VOLUNTEER ORGANIZATION BY THE ORGANIC LAW OF ITS CREATION.

A third obstacle, more insurmountable still, is that embodied in the elementary rule which forbids such a construction of a statute or Constitution as will result in the elimination or destruction of any vital or necessary part of either. The whole instrument is to be examined with the view of ascertaining and preserving the force and meaning *of each and every part*, Coke Litt. 381 a. In expounding the Constitution of the United States, *every word must have due force and appropriate meaning*, for it is evident from the whole instrument that no word was unnecessarily used or needlessly added. Holmes *v.* Jamison, 14 Pet. 540. If the construction in question should prevail; if it should be held that Congress may *by a mere trick of legislative legerdemain* pretend to conscript the National Militia under the clause by which it raises *volunteer armies*, then by that trick the vital clause by which Congress is authorized "to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions" *will, with all its limitations, be entirely destroyed and eliminated from our constitutional system.* It was the attempt to carry out just such a trick of legislative legerdemain that Webster trampled to death in 1814, and Attorney General Wickersham in 1912.

THIS IS A GOVERNMENT OF LAW AND NOT OF MEN.

Our entire fabric of civil liberty rests upon the principle that this is a government of law "as contradistinguished to a government of functionaries." (Lieber, *Civil Liberty and Self-Government*, p. 91.) A famous commentator on the English Constitution has said: "With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The reports abound with cases in which officials have been

brought before the courts and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character, but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person." (Dicey, *The Law of the Constitution*, p. 183.) In United States *v.* Lee, 106 U. S. 196, this court, speaking in thunder tones through Mr. Justice Miller, said: "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the Government, from the highest to the lowest, are creations of the law and are bound to obey it. It is the only supreme power in our system of government, and every man who, by accepting office, participates in its functions, is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives."

This court must keep steadily in view the fact that the President and all other "officers of the Government, from the highest to the lowest, are creatures of the law and are bound to obey it." And so when in this case the President comes and demands the right to send by force and against his will this humble young man of the people across torpedo-sown seas to the battlefields of Europe, this court must, *in the name of the law, demand of the President his warrant.* If, in response to that demand, he presents the Conscription Act of May 18, 1917, this court must, after it has read it, line by line, and word for word, say: Mr. President, we fail to find in that Act one word that intimates, even indirectly, *that the Congress of the United States intended that any citizen conscripted under it should ever be taken beyond the territorial limits*

of the United States. As Congress is supposed to understand and obey the Constitution, we must presume that it knew that the National Militia called forth and conscripted by it "to execute the laws of the Union, suppress insurrections and repel invasions," can only be used at home for one of those three purposes. If those who represent the President shall then contend that there inheres in him, as Commander-in-Chief of the armies of the United States, *an implied power*, by virtue of the fact that the Congress has declared war, which authorizes him to command that all conscripts shall be taken to the battlefields of Europe, this court must answer—No, gentlemen, there is no such *principle* in the Constitution and laws of the United States; there is no *precedent for such a thing in our entire history*—this is "a government of law, not of men."

RULES OF CONSTRUCTION THIS COURT MUST FOLLOW IN PASSING UPON THE PRESIDENT'S MONSTROUS CLAIM OF AUTOCRATIC MILITARY POWER SET UP UNDER THE ACT OF MAY 18, 1917.

Before this court attempts so to construe the Act of May 18, 1917, as to authorize the President, *as Commander-in-Chief*, to order the forcible deportation of the National Militia over three thousands miles of sea to the battlefields of Europe, it should pause, and consider most deliberately, according to certain rules, such a momentous transaction, first, because it involves the lives not only of the half million of American youths now held in camps for such unlawful deportation, but also the lives of the hundreds of thousands, "perhaps millions" (to use the President's phrase), who may be subsequently conscripted under said Act; *second, because it involves directly the life of the Constitution of the United States as the fathers made it.* Even on ordinary occasions this court in construing statutes observes the following

rules: (1) a statute must be read with reference to all the facts connected with its enactment, such as the history of the times (Preston *v.* Browden, 1 Wheat. 121; U. S. *v.* Union Pacific R. R. Co., 91 U. S. 79); (2) every statute must be construed with reference to the object intended to be accomplished by it (U. S. *v.* Musgrave, 160 Fed. 700); (3) where the object of a statute (as in this case) does not appear upon its face, it is open to inquiry (Cochran *v.* Preston, 108 Md. 220); (4) in such a case, where the object of the statute is a matter of doubt, the court must so construe it as to cause the least possible injustice or prejudice to the public interest (Knowlton *v.* Moore, 178, 41); (5) every statute must be so construed as to avoid unconstitutionality; (6) *every statute must be construed in favor of liberty;* (7) last and most important of all in this case is the rule providing that where the particular statute to be construed is one of a group of statutes *in pari materia* they should all be considered as a connected whole, especially when the entire group has been enacted at the same session of the legislature. "The rule that statutes *in pari materia* should be considered together applies with peculiar force to statutes passed at the same session of the legislature; it is to be presumed *that such acts are imbued with the spirit and actuated by the same policy,* and they are to be construed together as parts of the same act." *Cyc. of Law and Procedure,* 36, p. 1151, and authorities cited.

The rule last stated is of profound importance here because the Government contends that the Act of May 18, 1917, must be so construed by this court as to authorize the President, as Commander-in-Chief, to order the forcible deportation of hundreds of thousands, perhaps millions, of American youths, constituting our National Militia, to the battlefields of Europe, *despite the fact that that particular Act contains not one word indicating, even*

indirectly, that Congress ever intended they should be so employed. Therefore the court must look to the whole group of war-statutes recently enacted by this Congress in order to ascertain whether or not the Act of May 18, 1917, the most important member of that group, is "*imbued with the spirit and actuated by the same policy.*" Proceeding under that rule, as the constitutional historian of the future will proceed, the court must take judicial notice, at the very threshold of its inquiry, of the fact that the entire group of war-statutes in question was *the outcome of a sudden yet silent constitutional revolution* through which the Executive Power, taking from the two houses of Congress the initiative in legislation, transformed itself into a Dictatorship. This court must judicially know what all the rest of the world knows, that the entire group of war-statutes, of which the Act of May 18, 1917, is a part, was designed as a whole by the Executive Power and then submitted to the two houses for their ratification and acceptance, which was given under pressure with comparatively few changes.

In making a detailed examination of particular members of the group of war-statutes thus enacted at the instance of the Executive Power, the court must take judicial notice of the fact that "*the law of the land,*" generally called due process, has been, to a very serious extent, superseded by a vast system of regulation under which not only the food supply of the nation, but its manufacturing and business activites have been subjected to an autocratic Executive control under which the President, acting through his subordinates, undertakes on one day to inform the American people (in open defiance of the judgments of this court) that he has fixed the prices of certain leading commodities, such as coal and wheat, at so and so; on another he informs them that on that day all business and manufacturing activities must cease. As a

part of our current constitutional history this court knows judicially that the leading journal of this capital, often the mouthpiece of the Executive Power, has just made this startling announcement:

"Legislation of the most far-reaching character is in process of enactment. Under it the United States government will have the power of life and death over the railroads, the banks and all the industries. This means that the government—the executive branch of the government—will have the power to change the daily habits of millions of people; to force them to take up new means of earning a livelihood; to make millionaires or paupers in an hour."

Such autocratic control as that over the private life and private property of the people was never assumed by the monarchy in France, even in the darkest days that preceded the French Revolution. This court must further take judicial notice of the fact that under some claim of authority based on some one of the group of war-statutes, the Executive Power has suddenly seized and taken into its possession and control, without any judicial proceedings whatever, thousands of millions of private property belonging to the railroads of the country, which it is now operating and which it proposes to hold and operate either indefinitely or for a long period after the war has terminated, thus clearly indicating the fact that the existing Dictatorship is to continue after the war has ended. The court must further take judicial notice of the fact that there is now pending in Congress a bill, backed and urged by the Executive Power, which, if it takes on the forms of law, will at least, as a *de facto* statute (it cannot possibly be anything more) sweep into the hands of the President "*as Commander-in-Chief of the land and naval forces*" (that is the language of the pending bill) such an aggregation of powers as no monarch ever wielded in any constitutional government that ever existed. In the pres-

ence of such alarming conditions, unprecedented in English and American constitutional history, a calm and thoughtful Senator of the United States, a leader of the dominant party, said very recently in his place:

"When you step *one foot beyond the period of war* and turn our transportation systems over to one-man power you are establishing machinery for oppression, building up an organization for destruction of business, and endangering fundamental rights of the people.

"Our own government possesses today the constitutional checks and balances that protect us from the despotism of the autocrat and the spirit of the mob, provided Congress will uphold them. When Congress is ready to surrender these constitutional checks and establish a government of men instead of law, then there is danger ahead for the American people."

THIS COURT WILL NEVER SUPPORT A CONSTRUCTION WHICH, DEPARTING FROM THE GENERAL SYSTEM OF THE LAWS, OVERTHROWS FUNDAMENTAL RIGHTS AND PRINCIPLES.

In United States *v.* Fisher, 2 Cranch 390, this court, speaking through Marshall, C. J., said: "Where rights are infringed, where fundamental principles are overthrown, *where the general system of the laws is departed from*, the legislative intention must be expressed with irresistible clearness to induce a court of justice *to suppose a design to effect such objects.*" As the Congress has just as much authority, *according to all preceding constitutional ideas*, "to call forth the [national] militia" under the "*Commerce clause*" of the Constitution, as under that clause specially designed to give it authority to raise and support regular armies *on a strictly volunteer basis*, a holding by this court that the National Militia may be called forth under the clause last named will represent not only *a revolutionary departure from "the general system of the laws,"* but a destruction of fundamental rights and principles as old

as the common law itself. In the first place such a holding will entirely eliminate from the Constitution, *as by amendment*, the vital clause authorizing Congress "to provide for calling forth the [national] militia to execute the laws of the Union, suppress insurrections and repel invasions"—the deadly result the Government is striving to reach in this case. If the National Militia may be called forth, as the Government contends, under the authority "to raise and support" *regular volunteer armies*, then the other clause specially designed to give Congress the power to call forth the National Militia is *functus officio;* it no longer has a field in which to operate; in the language of the new dispensation, it is "obsolete." How can this court impute to the Congress any such *revolutionary purpose*, when it has not said one single word in the Conscription Act of May 18, 1917, upon which such an assumption can be predicated?

This court never construes any statute in derogation of common right, or in derogation of a right guaranteed by the common law. United States *v.* Fisher, 2 Cranch 358; Brown *v.* Barry, 3 Dall. 365. The sacred right in question —exemption of the militia from service abroad—is now the oldest existing right known to the common law. Will this court decree *its destruction by construction* when it remembers that the sending, *by the hard hand of conscription*, raw and untrained militia over thousands of miles of sea *to fight veterans in foreign lands is a desperate adventure that has no precedent in the history of civilization.* Such work, whether done by Rome or England, has always been done heretofore by trained and seasoned veteran legions, *every member of whom was a volunteer.* Last and most of all this court and all courts in construing statutes invariably look ahead to "*effects and consequences.*" Cyc. of L. and P. 36, p. 1111. This court held in Knowlton *v.* Moore, 178 U. S. 42, that a particular construction of a

statute which will occasion great inconvenience or produce inequality and injustice must be avoided. This court knows judicially that the sending of our raw and untrained militia over sea to fight veterans in foreign lands is *a desperate adventure* without precedent in our history. In the war of 1812 the militia refused even to invade Canada; the defendant in this case says they could not be used in the Mexican War because of the constitutional immunity set up here; the President has said "American armies were never before sent across the seas." The militia can not be sent now *unless this court expressly authorizes it.* Before this court assumes that awful responsibility; *before it sets aside an ancient constitutional immunity which every American citizen has heretofore considered his birthright,* it should look ahead to "*effects and consequences*"; it should remember that if these raw and untrained American youths are sent over sea, *under existing circumstances,* to fight veterans in foreign lands, *they will die by thousands and tens of thousands.* The ultimate responsibility will then rest here as Congress has kept its skirts clear.

SHALL THE EXISTING POLITICAL DICTATORSHIP BE TRANSFORMED INTO A MILITARY DICTATORSHIP BY A JUDGMENT OF THIS COURT?

If we have succeeded in convincing the court that the war-statutes in question have transformed the ancient Chief Magistracy, known as the Presidency, into a vast and unrestrained political dictatorship, the only question that remains is this: Shall the Conscription Act of May 18, 1917, be so construed by this court as to convert the existing political dictatorship into a military dictatorship, *armed with unlimited control over the sword?* The answer to be given to that question means life or death to the Constitution of the United States as the fathers founded it. The future historian, reviewing the psychology of this abnormal epoch, will wonder how it was possible, even during the hysteria of war, for any one to

dare to challenge here the exemption of the National Militia from service abroad, after it had been so long settled by every sanction which jurists and statesmen have heretofore considered sacred. He will look (1) at the fact that such exemption was the law of the English people for a thousand years before our severance from the mother country; (2) he will look to the process through which such exemption was imbedded in the Constitution drafted at Philadelphia in 1787; (3) he will look to the memorable occasion on which Daniel Webster trampled to death, in 1814, a cunning device then contrived to remove it from the Constitution without an amendment of it; (4) he will look to the judgment rendered by this court in 1827, which is conclusive of it; (5) he will look to the opinion delivered by Attorney General Wickersham in 1912, and concurred in by President Taft, crushing for a second time a cunning device then contrived to remove it from the Constitution without an amendment of it; (6) he will look to the four speeches delivered by President Wilson, in 1916, confirming and recognizing the law as Attorney General Wickersham had proclaimed it; (7) he will look to the all-important fact that, after the present war began, the English militia could not be sent across the Channel until their ancient immunity from foreign service had been removed from the English Constitution through an amendment of it made by the Omnipotent Parliament. After this court has reviewed that long procession of precedents as they march down through the centuries from the West Saxon Ecgberht to George V, it will perceive that there is not even a shadow upon the ancient constitutional immunity in question which is worthy of serious discussion. The spectacle would not be more sad or more startling, to every liberty-loving American patriot, if the Executive Power were here demanding the recognition by this court, *in the absence of a*

constitutional amendment, of the abolition of religious liberty, or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances. We do not speak of freedom of the press, as that has been extinguished long ago by the drastic censorship vested in the Postmaster General, who can, in forty-eight hours, crush any newspaper in the United States that may place itself under the ban of his displeasure.

THE MOST DELIBERATE AND TRANSPARENT ASSAULT EVER MADE UPON THE CONSTITUTION.

Ever since iron safes were invented lawless men have been employing their ingenuity in constructing jimmies, wedges and drills by which their resistive power may be overcome. And so ever since the fathers invented the great iron safe known as the Federal Constitution of 1789, *as a treasure-box in which this court might guard the liberties of the American people*, lawless men have been employing their ingenuity in constructing jimmies, wedges and drills by which its resistive power may be overcome. The literature of this court is largely made up of cases in which, as the Master Detective, it has discovered and thwarted all such designs. In this case its task should be comparatively easy because the pending design, which failed to drive the militia into Canada in 1814, and into Cuba and the Philippines in 1912, has, by those failures, been thoroughly discredited. To the judicial chess-player the combination, as it now presents itself on the board, is very simple. Reduced to its final form it is this: *First move*—Improvise a "National Army," as a "camouflage" unknown to the Constitution and the laws; *second move*—make such "National Army" swallow the "National Militia," and thus deprive it of all its constitutional attributes; *third move*—strike out the vital clause authorizing Congress "to provide for calling forth the [national] militia to execute the laws of the Union, suppress insurrection and repel invasions" and substitute in its

place the clause authorizing it "to raise and support [regular *volunteer*] armies"; *fourth move*—claim that your camouflage "National Army," *thus conscripted as a* VOLUNTARY ORGANIZATION, can be sent to fight in any part of the world by a mere military order of the President as commander-in-chief. Will not this court, as the Master Detective, say to those who have constructed these daring and transparent devices—"Your schemes are glass, the very sun shines through them"; you insult our intelligence.

THE AMERICAN PEOPLE HAVE NEVER AUTHORIZED IN ANY FORM THE DEPORTATION OF OUR NATIONAL MILITIA TO FOREIGN LANDS.

As the lives of half a million of conscripted American youths are in peril, as the life of the Constitution of the United States is in peril, this is a time for clear and courageous thinking and plain speaking. The counsellor of this court who is too cowardly to live up to the oath administered to him upon his induction into office to uphold and defend that Constitution under all circumstances has no right to appear in this case. Feeble we may be, but cowardly we can not be. With the profoundest possible respect and deference, we have attempted to state to the court just what the crucial question involved in this case really is. Briefly restated it is this: The fathers founded a military system purely *defensive;* in the words of the defendant in this case, Major General Leonard Wood: "Our policy is not one of aggression, *but one which looks only to a secure defense.*" Under the sudden excitement of a great war, the Executive Power has resolved to abolish that ancient system of "*a secure defense*" and to substitute in its place *a new and autocratic system of offense,* so extreme as to involve, *contrary to the practice of the civilized world,* the sending of raw conscripts over thousands of miles of sea to fight veterans in foreign lands. The Congress is absolutely powerless to work such a

fundamental change in our entire system of Government, even if it saw fit to do so. Such a revolutionary change, *really involving the establishment of the German military system on American soil*, can only be carried out by a Constitutional amendment. Those who do not dare to appeal to the American people to authorize such a fundamental change in their polity in the only way possible, have no right to appeal to this court to authorize it through the *usurpation of a power, the power of amendment, it is expressly forbidden to exercise.* This court has no power to amend the Constitution, but it has ample power to defend it.

THE DEFENSIVE POWERS OF THIS COURT.

Armed to the teeth as this court is with the defensive powers conferred upon it by the Federal Convention of 1787—such powers as were never conferred upon a court before—it has never faltered in its defence of the Constitution, and it will not falter now. Its first ordeal came in 1832, when Chief Justice Marshall, then in his seventy-seventh year, delivered his famous and elaborate judgment in Worcester *v.* Georgia, 6 Pet. 515, in the presence of a hostile public demonstration. Mr. Justice Story, who stood firmly by his side, thus wrote to Professor Ticknor, March 8, 1832: "The decision produced a very strong sensation in both Houses. Georgia is full of anger and violence. Probably she will resist the execution of our judgment and if she does, I do not believe the President will interfere, unless public opinion among the religious of the Eastern, Western and Middle States should be brought to bear strong upon him. The rumor is, that he has told the Georgians he will do nothing. I, for one, feel quite easy on the subject, be the event what it may. *The court has done its duty. Let the nation now do theirs.* If we have a Government, let its command be obeyed; if we have not, it is as well to know it at once, and look to consequences." Story, *Life and Letters*, II, 83.

The indomitable spirit breathed into this court by Marshall and Story, in 1832, manifested itself with increased power in 1866 when, amid the burning passions of the Civil War, Mr. Justice David Davis pronounced its immortal judgment in *Ex parte* Mulligan, 4 Wall. 2, by which military courts and martial law were forced to yield to trial by jury and civil law, the great jurist declaring at the same time that the pernicious doctrine that any clause or word of the Constitution is suspended by war is one that "leads directly to anarchy or despotism." When that great battle was to be fought, the leaders of the American bar did not hide in their tents; they came forth in battle-array led by Jeremiah S. Black, David Dudley Field, Joseph E. McDonald and James A. Garfield, whose voices sounded here "strong as an army with banners." But not until 1882 did the unbendable courage of this court put forth its full moral dignity and authority when, speaking through Mr. Justice Miller in United States *v.* Lee, 106 U. S. 196, it rendered a judgment which took the ancestral estate of the knightly chieftain of a fallen cause—an estate then held by the army of the United States "as a military station and national cemetery"—and restored it, with the ashes of the victorious dead upon it, to the heir of the conquered, *because it was his under "the law of the land."* The American people applauded as they always applaud when this court upholds against the high and mighty "the law of the land."

The greatest of all orators on the greatest of all occasions, in speaking of a supreme peril that had threatened the life of his country, said: at that moment "the people gave their voice, and the danger which hung upon our frontiers passed by like a cloud."* And so in this dreadful hour, when everything most dear to those who are still

* Dem., de Cor., §188.

loyal to the Constitution of their country as the fathers made it is at stake, the American people will give their voice, *through this court as their beloved and trusted mouthpiece*, and the danger which now hangs upon our frontiers will pass by like a cloud.

Most humbly and respectfully submitted.

HANNIS TAYLOR,
JOSEPH E. BLACK,
Counsel for Appellant.

APPENDIX

THE ONLY TWO CONSCRIPTION LAWS EVER ENACTED BY THE CONGRESS OF THE UNITED STATES.

The *second*, the Act of May 18, 1917, is a substantial reproduction of the *first*, the Act of March 3, 1863, *so far as conscription is concerned.*

The Act of March 3, 1863

An Act for enrolling and calling out the national Forces, and for other Purposes.

Whereas there now exist in the United States AN INSURRECTION AND REBELLION against the authority thereof, and it is, under the Constitution of the United States, the duty of the government to SUPPRESS INSURRECTION AND REBELLION, to guarantee to each State a republican form of government, and to preserve the public tranquility; and whereas, for these high purposes, a military force is indispensable, to raise and support which all persons ought willingly to contribute; and whereas no service can be more praiseworthy and honorable than that which is rendered for the maintenance of the Constitution and Union, and the consequent preservation of free government: Therefore—

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared on oath their intention to become citizens under and in pursuance of the laws thereof, between the ages of twenty and forty-five years, except as hereinafter excepted, are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States when called out by the President for that purpose.

SEC. 2. *And be it further enacted*, That the following persons be, and they are hereby, excepted and exempt from the provisions of this Act, and shall not be liable to military duty under the same, to wit: Such as are rejected as physically or mentally unfit for the service; also, First the Vice-President of the United

The Act of May 18, 1917

An Act to authorize the President to increase temporarily the Military Establishment of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in view of the existing emergency, which demands the raising of troops in addition to those now available, the President be, and he is hereby, authorized—

First. Immediately to raise, organize, officer, and equip all or such number of increments of the Regular Army provided by the national defense Act approved June third, nineteen hundred and sixteen, or such parts thereof as he may deem necessary; to raise all organizations of the Regular Army, including those added by such increments, to the maximum enlisted strength authorized by law. Vacancies in the Regular Army created or caused by the addition of increments as herein authorized which can not be filled by promotion may be filled by temporary appointment for the period of the emergency or until replaced by permanent appointments or by provisional appointments made under the provisions of section twenty-three of the national defense Act, approved June third, nineteen hundred and sixteen, and hereafter provisional appointments under said section may be terminated whenever it is determined, in the manner prescribed by the President, that the officer has not the suitability and fitness requisite for permanent appointment.

Second. To draft into the military service of the United States, organize, and officer, in accordance with the provisions of section one hundred and eleven of said national defense Act, so far as the provisions of said section may be applicable and not inconsistent with

States, the judges of the various courts of the United States, the heads of the various executive departments of the government, and the governors of the several States. Second, the only son liable to military duty of a widow dependent upon his labor for support. Third, the only son of aged or infirm parent or parents dependent upon his labor for support. Fourth, where there are two or more sons of aged or infirm parents subject to draft, the father, or, if he be dead, the mother, may elect which son shall be exempt. Fifth, the only brother of children not twelve years old, having neither father nor mother, dependent upon his labor for support. Sixth, the father of motherless children under twelve years of age dependent upon his labor for support. Seventh, where there are a father and sons in the same family and household, and two of them are in the military service of the United States as non-commissioned officers, musicians, or privates, the residue of such family and household, not exceeding two, shall be exempt. And no persons but such as are herein excepted shall be exempt: *Provided, however*, That no person who has been convicted of any felony shall be enrolled or permitted to serve in said forces.

SEC. 3. *And be it further enacted*, That the national forces of the United States not now in the military service, enrolled under this act, shall be divided into two classes, the first of which shall comprise all persons subject to do military duty between the ages of twenty and thirty-five years and all unmarried persons subject to do military duty above the age of thirty-five and under the age of forty-five; the second class shall comprise all other persons subject to do military duty, and they shall not, in any district, be called into the service of the United States until those of the first class shall have been called.

SEC. 4. *And be it further enacted*, That, for greater convenience in enrolling, calling out, and organizing the national forces, and for the arrest of deserters and spies of the enemy, the United States shall be divided into districts, of which the District of Columbia shall constitute one, each territory of the United States shall constitute one or more, as the

the terms of this Act, any or all members of the National Guard and of the National Guard Reserves, and said members so drafted into the military service of the United States shall serve therein for the period of the existing emergency unless sooner discharged: *Provided*, That when so drafted the organizations or units of the National Guard shall, so far as practicable, retain the State designations of their respective organizations.

Third. To raise by draft as herein provided, organize and equip an additional force of five hundred thousand enlisted men, or such part or parts thereof as he may at any time deem necessary, and to provide the necessary officers, line and staff, for said force and for organizations of the other forces hereby authorized, or by combining organizations of said other forces, by ordering members of the Officers' Reserve Corps to temporary duty in accordance with the provisions of section thirty-eight of the national defense Act approved June third, nineteen hundred and sixteen; by appointment from the Regular Army, the Officers' Reserve Corps, from those duly qualified and registered pursuant to section twenty-three of the Act of Congress approved January twenty-first, nineteen hundred and three (Thirty-second Statutes at Large, page seven hundred and seventy-five), from the members of the National Guard drafted into the service of the United States, from those who have been graduated from educational institutions at which military instruction is compulsory, or from those who have had honorable service in the Regular Army, the National Guard, or in the volunteer forces, or from the country at large; by assigning retired officers of the Regular Army to active duty with such force with their rank on the retired list and the full pay and allowances of their grade; or by the appointment of retired officers and enlisted men, active or retired, of the Regular Army as commissioned officers in such forces: *Provided*, That the organization of said force shall be the same as that of the corresponding organizations of the Regular Army: *Provided further*, That the President is authorized to increase or decrease the number of organ-

President shall direct, and each congressional district of the respective states, as fixed by a law of the state next preceding the enrollment, shall constitute one: *Provided*, That in states which have not by their laws been divided into two or more congressional districts, the President of the United States shall divide the same into so many enrolment districts as he may deem fit and convenient.

SEC. 5. *And be it further enacted*, That for each of said districts there shall be appointed by the President a provost-marshal, with the rank, pay and emoluments of a captain of cavalry, or an officer of said rank shall be detailed by the President, who shall be under the direction and subject to the orders of a provost-marshal-general, appointed or detailed by the President of the United States, whose office shall be at the seat of government, forming a separate bureau of the War Department, and whose rank, pay, and emoluments shall be those of a colonel of cavalry.

SEC. 6. *And be it further enacted*, That it shall be the duty of the provost-marshal-general, with the approval of the Secretary of War, to make rules and regulations for the government of his subordinates; to furnish them with the names and residences of all deserters from the army, or any of the land forces in the service of the United States, including the militia, when reported to him by the commanding officers; to communicate to them all orders of the President in reference to calling out the national forces; to furnish proper blanks and instructions for enrolling and drafting; to file and preserve copies of all enrolment lists; to require stated reports of all proceedings on the part of his subordinates; to audit all accounts connected with the service under his direction; and to perform such other duties as the President may prescribe in carrying out the provisions of this act.

SEC. 7. *And be it further enacted*, That it shall be the duty of the provost-marshals to arrest all deserters, whether regulars, volunteers, militiamen, or persons called into the service under this or any other act of Congress, wherever they may be found, and to send them to the nearest military commander or military post; to detect, seize, and confine

izations prescribed for the typical brigades, divisions, or army corps of the Regular Army, and to prescribe such new and different organizations and personnel for army corps, divisions, brigades, regiments, battalions, squadrons, companies, troops, and batteries as the efficiency of the service may require: *Provided further*, That the number of organizations in a regiment shall not be increased nor shall the number of regiments be decreased: *Provided further*, That the President in his discretion may organize, officer, and equip for each Infantry and Cavalry brigade three machine-gun companies, and for each Infantry and Cavalry division four machine-gun companies, all in addition to the machine-gun companies comprised in organizations included in such brigades and divisions: *Provided further*, That the President in his discretion may organize for each division one armored motor car machine-gun company. The machine-gun companies organized under this section shall consist of such commissioned and enlisted personnel and be equipped in such manner as the President may prescribe: *And provided further*, That officers with rank not above that of colonel shall be appointed by the President alone, and officers above that grade by the President by and with the advice and consent of the Senate: *Provided further*, That the President may in his discretion recommission in the Coast Guard persons who have heretofore held commissions in the Revenue-Cutter Service or the Coast Guard and have left the service honorably, after ascertaining that they are qualified for service physically, morally, and as to age and military fitness.

Fourth. The President is further authorized, in his discretion and at such time as he may determine, to raise and begin the training of an additional force of five hundred thousand men organized, officered, and equipped, as provided for the force first mentioned in the preceding paragraph of this section.

Fifth. To raise by draft, organize, equip, and officer, as provided in the third paragraph of this section in addition to and for each of the above forces such recruit training units as he may

spies of the enemy, who shall without unreasonable delay be delivered to the custody of the general commanding the department in which they may be arrested, to be tried as soon as the exigencies of the service permit; to obey all lawful orders and regulations of the provost-marshal-general, and such as may be prescribed by law, concerning the enrolment and calling into service of the national forces.

SEC. 8. *And be it further enacted*, That in each of said districts, there shall be a board of enrolment, to be composed of the provost-marshal, as president, and two other persons, to be appointed by the President of the United States, one of whom shall be a licensed and practising physician and surgeon.

SEC. 9. *And be it further enacted*, That it shall be the duty of the said board to divide the district into sub-districts of convenient size, if they shall deem it necessary, not exceeding two, without the direction of the Secretary of War, and to appoint, on or before the tenth day of March next, and in each alternate year thereafter, an enrolling officer for each sub-district, and to furnish him with proper blanks and instructions; and he shall immediately proceed to enroll all persons subject to military duty, noting their respective places of residence, ages on the first day of July following, and their occupation, and shall, on or before the first day of April, report the same to the board of enrolment, to be consolidated into one list, a copy of which shall be transmitted to the provost-marshal-general on or before the first day of May succeeding the enrolment: *Provided, nevertheless*, That if from any cause the duties prescribed by this section cannot be performed within the time specified, then the same shall be performed as soon thereafter as practicable.

SEC. 10. *And be it further enacted*, That the enrolment of each class shall be made separately, and shall only embrace those whose ages shall be on the first day of July thereafter between twenty and forty-five years.

SEC. 11. *And be it further enacted*, That all persons thus enrolled shall be subject, for two years after the first day of July succeeding the enrolment, to be called into the military service of the United deem necessary for the maintenance of such forces at the maximum strength.

Sixth. To raise, organize, officer, and maintain during the emergency such number of ammunition batteries and battalions, depot batteries and battalions, and such artillery parks, with such numbers and grades of personnel as he may deem necessary. Such organizations shall be officered in the manner provided in the third paragraph of this section, and enlisted men may be assigned to said organizations from any of the forces herein provided for or raised by selective draft as by this Act provided.

Seventh. The President is further authorized to raise and maintain by voluntary enlistment, to organize, and equip, not to exceed four infantry divisions, the officers of which shall be selected in the manner provided by paragraph three of section one of this Act: *Provided*, That the organization of said force shall be the same as that of the corresponding organization of the Regular Army: *And provided further*, That there shall be no enlistments in said force of men under twenty-five years of age at time of enlisting: *And provided further*, That no such volunteer force shall be accepted in any unit smaller than a division.

SEC. 2. That the enlisted men required to raise and maintain the organizations of the Regular Army and to complete and maintain the organizations embodying the members of the National Guard drafted into the service of the United States, at the maximum legal strength as by this Act provided, shall be raised by voluntary enlistment, *or if and whenever the President decides that they can not effectually be so raised or maintained, then by selective draft;* and all other forces hereby authorized, except as provided in the seventh paragraph of section one, shall be raised and maintained by selective draft exclusively; but this provision shall not prevent the transfer to any force of training cadres from other forces. Such draft as herein provided shall be based upon liability to military service of all male citizens, or male persons not alien enemies who have declared their intention to become citizens, between the ages of twenty-one and thirty years, both inclusive, and shall

States, and to continue in service during the present rebellion, not, however, exceeding the term of three years; and when called into service shall be placed on the same footing, in all respects, as volunteers for three years, or during the war, including advance pay and bounty as now provided by law.

SEC. 12. *And be it further enacted*, That whenever it may be necessary to call out the national forces for military service, the President is hereby authorized to assign to each district the number of men to be furnished by said district; and thereupon the enrolling board shall, under the direction of the President, make a draft of the required number, and fifty per cent. in addition, and shall make an exact and complete roll of the names of the persons so drawn, and of the order in which they were drawn, so that the first drawn may stand first upon the said roll, and the second may stand second, and so on; and the persons so drawn shall be notified of the same within ten days thereafter, by a written or printed notice, to be served personally or by leaving a copy at the last place of residence, requiring them to appear at a designated rendezvous to report for duty. In assigning to the districts the number of men to be furnished therefrom, the President shall take into consideration the number of volunteers and militia furnished by and from the several states in which said districts are situated, and the period of their service since the commencement of the present rebellion, and shall so make said assignment as to equalize the numbers among the districts of the several states, considering and allowing for the numbers already furnished as aforesaid and the time of their service.

SEC. 13. *And be it further enacted*, That any person drafted and notified to appear as aforesaid, may, on or before the day fixed for his appearance, furnish an acceptable substitute to take his place in the draft; or he may pay to such person as the Secretary of War may authorize to receive it, such sum, not exceeding three hundred dollars, as the Secretary may determine, for the procuration of such substitute; which sum shall be fixed at a uniform rate by a general order made at the time of ordering a take place and be maintained under such regulations as the President may prescribe not inconsistent with the terms of this Act. Quotas for the several States, Territories, and the District of Columbia, or subdivisions thereof, shall be determined in proportion to the population thereof, and credit shall be given to any State, Territory, District, or subdivision thereof, for the number of men who were in the military service of the United States as members of the National Guard on April first, nineteen hundred and seventeen, or who have since said date entered the military service of the United States from any such State, Territory, District, or subdivision, either as members of the Regular Army or the National Guard. All persons drafted into the service of the United States and all officers accepting commissions in the forces herein provided for shall, from the date of said draft or acceptance, be subject to the laws and regulations governing the Regular Army, except as to promotions, so far as such laws and regulations are applicable to persons whose permanent retention in the military service on the active or retired list is not contemplated by existing law, and those drafted shall be required to serve for the period of the existing emergency unless sooner discharged: *Provided*, That the President is authorized to raise and maintain by voluntary enlistment or draft, as herein provided, special and technical troops as he may deem necessary, and to embody them into organizations and to officer them as provided in the third paragraph of section one and section nine of this Act. Organizations of the forces herein provided for, except the Regular Army and the divisions authorized in the seventh paragraph of section one, shall, as far as the interests of the service permit, be composed of men who come, and of officers who are appointed from, the same State or locality.

SEC. 3. No bounty shall be paid to induce any person to enlist in the military service of the United States; and no person liable to military service shall hereafter be permitted or allowed to furnish a substitute for such service; nor shall any substitute be received, enlisted, or enrolled in the military service of the

draft for any state or territory; and thereupon such person so furnishing the substitute, or paying the money shall be discharged from further liability under that draft. And any person failing to report after due service of notice, as herein prescribed, without furnishing a substitute, or paying the required sum therefor, shall be deemed a deserter, and shall be arrested by the provost-marshal and sent to the nearest military post for trial by court-martial, unless, upon proper showing that he is not liable to do military duty, the board of enrolment shall relieve him from the draft.

SEC. 14. *And be it further enacted*, That all drafted persons shall, on arriving at the rendezvous, be carefully inspected by the surgeon of the board, who shall truly report to the board the physical condition of each one; and all persons drafted and claiming exemption from military duty on account of disability, or any other cause, shall present their claims to be exempted to the board, whose decision shall be final.

SEC. 15. *And be it further enacted*, That any surgeon charged with the duty of such inspection who shall receive from any person whomsoever any money or other valuable thing, or agree, directly or indirectly, to receive the same to his own or another's use for making an imperfect inspection or a false or incorrect report, or who shall wilfully neglect to make a faithful inspection and true report, shall be tried by a court-martial, and, on conviction thereof, be punished by fine not exceeding five hundred dollars nor less than two hundred, and be imprisoned at the discretion of the court, and be cashiered, and dismissed from the service.

SEC. 16. *And be it further enacted*, That as soon as the required number of able-bodied men liable to do military duty shall be obtained from the list of those drafted, the remainder shall be discharged; and all drafted persons reporting at the place of rendezvous shall be allowed travelling pay from their places of residence; and all persons discharged at the place of rendezvous shall be allowed travelling pay to their places of residence; and all expenses connected with the enrolment and draft, including subsistence while at the rendezvous, United States; and no such person shall be permitted to escape such service or to be discharged therefrom prior to the expiration of his term of service by the payment of money or any other valuable thing whatsoever as consideration for his release from military service or liability thereto.

SEC. 4. That the Vice-President of the United States, the officers, legislative, executive, and judicial, of the United States and of the several States, Territories, and the District of Columbia, regular or duly ordained ministers of religion, students who at the time of the approval of this Act are preparing for the ministry in recognized theological or divinity schools, and all persons in the military and naval service of the United States shall be exempt from the selective draft herein prescribed; and nothing in this Act contained shall be construed to require or compel any person to serve in any of the forces herein provided for who is found to be a member of any well-recognized religious sect or organization at present organized and existing and whose existing creed or principles forbid its members to participate in war in any form and whose religious convictions are against war or participation, therein in accordance with the creed or principles of said religious organizations, but no person so exempted shall be exempted from service in any capacity that the President shall declare to be noncombatant; and the President is hereby authorized to exclude or discharge from said selective draft and from the draft under the second paragraph of section one hereof, or to draft for partial military service only from those liable to draft as in this Act provided, persons of the following classes: County and municipal officials; customhouse clerks; persons employed by the United States in the transmission of the mail; artificers and workmen employed in the armories, arsenals, and navy yards of the United States, and such other persons employed in the service of the United States as the President may designate; pilots, mariners actually employed in the sea service of any citizen or merchant within the United States; persons engaged in industries, including agriculture, found to be necessary to the maintenance of

shall be paid from the appropriation for enrolling and drafting, under such regulations as the President of the United States shall prescribe; and all expenses connected with the arrest and return of deserters to their regiments, or such other duties as the provost-marshal shall be called upon to perform, shall be paid from the appropriation for arresting deserters, under such *such* regulations as the President of the United States shall prescribe: *Provided*, The provost-marshals shall in no case receive commutation for transportation or for fuel and quarters, but only for forage, when not furnished by the government, together with actual expenses of postage, stationery, and clerk hire authorized by the provost-marshal-general.

SEC. 17. *And be it further enacted*, That any person enrolled and drafted according to the provisions of this act who shall furnish an acceptable substitute, shall thereupon receive from the board of enrolment a certificate of discharge from such draft, which shall exempt him from military duty during the time for which he was drafted; and such substitute shall be entitled to the same pay and allowances provided by law as if he had been originally drafted into the service of the United States.

SEC. 18. *And be it further enacted*, That such of the volunteers and militia now in the service of the United States as may reenlist to serve one year, unless sooner discharged, after the expiration of their present term of service, shall be entitled to a bounty of fifty dollars, one-half of which to be paid upon such reenlistment, and the balance at the expiration of the term of reenlistment; and such as may reenlist to serve for two years, unless sooner discharged, after the expiration of their present term of enlistment, shall receive, upon such reenlistment, twenty-five dollars of the one hundred dollars bounty for enlistment provided by the fifth section of the act approved twenty-second of July, eighteen hundred and sixty-one, entitled "An act to authorize the employment of volunteers to aid in enforcing the laws and protecting public property."

SEC. 19. *And be it further enacted*, That whenever a regiment of volunteers of the same arm, from the same State, is re-

the Military Establishment or the effective operation of the military forces or the maintenance of national interest during the emergency; those in a status with respect to persons dependent upon them for support which renders their exclusion or discharge advisable; and those found to be physically or morally deficient. No exemption or exclusion shall continue when a cause therefor no longer exists: *Provided*, That notwithstanding the exemptions enumerated herein, each State, Territory, and the District of Columbia shall be required to supply its quota in the proportion that its population bears to the total population of the United States.

The President is hereby authorized, in his discretion, to create and establish throughout the several States and subdivisions thereof and in the Territories and the District of Columbia local boards and where, in his discretion, practicable and desirable, there shall be created and established one such local board in each county or similar subdivision in each State, and one for approximately each thirty thousand of population in each city of thirty thousand population or over, according to the last census taken or estimates furnished by the Bureau of Census of the Department of Commerce. Such boards shall be appointed by the President, and shall consist of three or more members, none of whom shall be connected with the Military Establishment, to be chosen from among the local authorities of such subdivisions or from other citizens residing in the subdivision or area in which the respective boards will have jurisdiction under the rules and regulations prescribed by the President. Such boards shall have power within their respective jurisdictions to hear and determine, subject to review as hereinafter provided, all questions of exemption under this Act, and all questions of or claims for including or discharging individuals or classes of individuals from the selective draft, which shall be made under rules and regulations prescribed by the President, except any and every question or claim for including or excluding or discharging persons or classes of persons from the selective draft under the provisions of this Act authorizing the Presi-

duced to one-half the maximum number prescribed by law, the President may direct the consolidation of the companies of such regiment: *Provided*, That no company so formed shall exceed the maximum number prescribed by law. When such consolidation is made, the regimental officers shall be reduced in proportion to the reduction in the number of companies.

SEC. 20. *And be it further enacted*, That whenever a regiment is reduced below the minimum number allowed by law, no officers shall be appointed in such regiment beyond those necessary for the command of such reduced number.

SEC. 21. *And be it further enacted*, That so much of the fifth section of the act approved seventeenth July, eighteen hundred and sixty-two, entitled, "An act to amend an act calling forth the militia to execute the laws of the Union," and so forth, as requires the approval of the President to carry into execution the sentence of a court-martial be, and the same is hereby, repealed, as far as relates to carrying into execution the sentence of any court-martial against any person convicted as a spy or deserter, or of mutiny or murder; and hereafter sentences in punishment of these offences may be carried into execution upon the approval of the commanding general in the field.

SEC. 22. *And be it further enacted*, That courts-martial shall have power to sentence officers who shall absent themselves from their commands without leave, to be reduced to the ranks or to serve three years or during the war.

SEC. 23. *And be it further enacted*, That the clothes, arms, military outfits, and accoutrements furnished by the United States to any soldier, shall not be sold, bartered, exchanged, pledged, loaned, or given away; and no person not a soldier, or duly authorized officer of the United States, who has possession of any such clothes, arms, military outfits or accoutrements, furnished as aforesaid, and which have been the subjects of any such sale, barter, exchange, pledge, loan, or gift, shall have any right, title, or interest therein; but the same may be seized and taken wherever found by any officer of the United States, civil or military, and shall thereupon be delivered to any quartermaster, or other officer authorized

dent to exclude or discharge from the selective draft "Persons engaged in industries, including agriculture, found to be necessary to the maintenance of the Military Establishment, or the effective operation of the military forces, of the maintenance of national interest during the emergency."

The President is hereby authorized to establish additional boards, one in each Federal judicial district of the United States, consisting of such number of citizens, not connected with the Military Establishment, as the President may determine, who shall be appointed by the President. The President is hereby authorized, in his discretion, to establish more than one such board in any Federal judicial district of the United States, or to establish one such board having jurisdiction of an area extending into more than one Federal judicial district.

Such district boards shall review on appeal and affirm, modify, or reverse any decision of any local board having jurisdiction in the area in which any such district board has jurisdiction under the rules and regulations prescribed by the President. Such district boards shall have exclusive original jurisdiction within their respective areas to hear and determine all questions or claims for including or excluding or discharging persons or classes of persons from the selective draft, under the provisions of this Act, not included within the original jurisdiction of such local boards.

The decisions of such district boards shall be final except that, in accordance with such rules and regulations as the President may prescribe, he may affirm, modify or reverse any such decision.

Any vacancy in any such local board or district board shall be filled by the President, and any member of any such local board or district board may be removed, and another appointed in his place by the President, whenever he considers that the interest of the nation demands it.

The President shall make rules and regulations governing the organization and procedure of such local boards and district boards, and providing for and governing appeals from such local boards to such district boards, and reviews of

to receive the same; and the possession of any such clothes, arms, military outfits, or accoutrements, by any person not a soldier or officer of the United States, shall be *prima facie* evidence of such a sale, barter, exchange, pledge, loan, or gift, as aforesaid.

SEC. 24. *And be it further enacted*, That every person not subject to the rules and articles of war who shall procure or entice, or attempt to procure and entice, a soldier in the service of the United States to desert; or who shall harbor, conceal, or give employment to a deserter, or carry him away, or aid in carrying him away, knowing him to be such, or who shall purchase from any soldier his arms, equipments, ammunition, uniform, clothing, or any part thereof; and any captain or commanding officer of any ship or vessel, or any superintendent or conductor of any railroad, or any other public conveyance, carrying away any such soldier as one of his crew or otherwise, knowing him to have deserted, or shall refuse to deliver him up to the orders of his commanding officer, shall, upon legal conviction, be fined, at the discretion of any court having cognizance of the same, in any sum not exceeding five hundred dollars, and he shall be imprisoned not exceeding two years nor less than six months.

SEC. 25. *And be it further enacted*, That if any person shall resist any draft of men enrolled under this act into the service of the United States, or shall counsel or aid any person to resist any such draft; or shall assault or obstruct any officer in making such draft, or in the performance of any service in relation thereto; or shall counsel any person to assault or obstruct any such officer, or shall counsel any drafted man not to appear at the place of rendezvous, or wilfully dissuade them from the performance of military duty as required by law, such person shall be subject to summary arrest by the provost marshal, and shall be forthwith delivered to the civil authorities, and, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding two years, or by both of said punishments.

SEC. 26. *And be it further enacted*, That immediately after the passage of this act, the President shall issue his proclathe decisions of any local board by the district board having jurisdiction, and determining and prescribing the several areas in which the respective local boards and district boards shall have jurisdiction, and all other rules and regulations necessary to carry out the terms and provisions of this section, and shall provide for the issuance of certificates of exemption, or partial or limited exemptions, and for a system to exclude and discharge individuals from selective draft.

SEC. 5. That all male persons between the ages of twenty-one and thirty, both inclusive, shall be subject to registration in accordance with regulations to be prescribed by the President; and upon proclamation by the President or other public notice given by him or by his direction stating the time and place of such registration it shall be the duty of all persons of the designated ages, except officers and enlisted men of the Regular Army, the Navy, and the National Guard and Naval Militia while in the service of the United States, to present themselves for and submit to registration under the provisions of this Act; and every such person shall be deemed to have notice of the requirements of this Act upon the publication of said proclamation or other notice as aforesaid given by the President or by his direction; and any person who shall wilfully fail or refuse to present himself for registration or to submit thereto as herein provided, shall be guilty of a misdemeanor and shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, and shall thereupon be duly registered: *Provided*, That in the call of the docket precedence shall be given, in courts trying the same, to the trial of criminal proceedings under this Act: *Provided further*, That persons shall be subject to registration as herein provided who shall have attained their twenty-first birthday and who shall not have attained their thirty-first birthday on or before the day set for the registration, and all persons so registered shall be and remain subject to draft into the forces hereby authorized, unless exempted or excused therefrom as in this Act provided: *Provided*

mation declaring that all soldiers now absent from their regiments without leave may return within a time specified to such place or places as he may indicate in his proclamation, and be restored to their respective regiments without punishment, except the forfeiture of their pay and allowances during their absence; and all deserters who shall not return within the time so specified by the President shall, upon being arrested, be punished as the law provides.

SEC. 27. *And be it further enacted*, That depositions of witnesses residing beyond the limits of the state, territory, or district in which military courts shall be ordered to sit, may be taken in cases not capital by either party, and read in evidence; provided the same shall be taken upon reasonable notice to the opposite party, and duly authenticated.

SEC. 28. *And be it further enacted*, That the judge advocate shall have power to appoint a reporter, whose duty it shall be to record the proceedings of and testimony taken before military courts instead of the judge advocate; and such reporter may take down such proceedings and testimony in the first instance in shorthand. The reporter shall be sworn or affirmed faithfully to perform his duty before entering upon it.

SEC. 29. *And be it further enacted*, That the court shall, for reasonable cause, grant a continuance to either party for such time and as often as shall appear to be just: *Provided*, That if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days.

SEC. 30. *And be it further enacted*, That in time of war, insurrection, or rebellion, murder, assault and battery with an intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with an intent to commit rape, and larceny, shall be punishable by the sentence of a general court-martial or military commission, when committed by persons who are in the military service of the United States, and subject to the articles of war; and the punishments for such offences shall never be less than those inflicted by the laws of the state, *further*, That in the case of temporary absence from actual place of legal residence of any person liable to registration as provided herein such registration may be made by mail under regulations to be prescribed by the President.

SEC. 6. That the President is hereby authorized to utilize the service of any or all departments and any or all officers or agents of the United States and of the several States, Territories, and the District of Columbia, and subdivisions thereof, in the execution of this Act, and all officers and agents of the United States and of the several States, Territories, and subdivisions thereof, and of the District of Columbia, and all persons designated or appointed under regulations prescribed by the President, whether such appointments are made by the President himself or by the governor or other officer of any State or Territory to perform any duty in the execution of this Act, are hereby required to perform such duty as the President shall order or direct, and all such officers and agents and persons so designated or appointed shall hereby have full authority for all acts done by them in the execution of this Act by the direction of the President. Correspondence in the execution of this Act may be carried in penalty envelopes bearing the frank of the War Department. Any person charged as herein provided with the duty of carrying into effect any of the provisions of this Act or the regulations made or directions given thereunder who shall fail or neglect to perform such duty; and any person charged with such duty or having and exercising any authority under said Act, regulations, or directions, who shall knowingly make or be a party to the making of any false or incorrect registration, physical examination, exemption, enlistment, enrollment, or muster; and any person who shall make or be a party to the making of any false statement or certificate as to the fitness or liability of himself or any other person for service under the provisions of this Act, or regulations made by the President thereunder, or otherwise evades or aids another to evade the requirements of this Act or of said regulations, or who in any manner, shall fail or neglect fully

territory, or district in which they may have been committed.

SEC. 31. *And be it further enacted*, That any officer absent from duty with leave, except for sickness or wounds, shall, during his absence, receive half of the pay and allowances prescribed by law, and no more; and any officer absent without leave shall, in addition to the penalties prescribed by law or a court-martial, forfeit all pay or allowances during such absence.

SEC. 32. *And be it further enacted*, That the commanders of regiments and of batteries in the field, are hereby authorized and empowered to grant furloughs for a period not exceeding thirty days at any one time to five per centum of the non-commissioned officers and privates, for good conduct in the line of duty, and subject to the approval of the commander of the forces of which such non-commissioned officers and privates form a part.

SEC. 33. *And be it further enacted*, That the President of the United States is hereby authorized and empowered, during the present rebellion, to call forth the national forces, by draft, in the manner provided for in this act.

SEC. 34. *And be it further enacted*, That all persons drafted under the provisions of this act shall be assigned by the President to military duty in such corps, regiments, or other branches of the service as the exigencies of the service may require.

SEC. 35. *And be it further enacted*, That hereafter details to special service shall only be made with the consent of the commanding officer of forces in the field; and enlisted men, now or hereafter detailed to special service, shall not receive any extra pay for such services beyond that allowed to other enlisted men.

SEC. 36. *And be it further enacted*, That general orders of the War Department, numbered one hundred and fifty-four and one hundred and sixty-two, in reference to enlistments from the volunteers into the regular service, be, and the same are hereby, rescinded; and hereafter no such enlistments shall be allowed.

SEC. 37. *And be it further enacted*, That the grades created in the cavalry forces to perform any duty required of him in the execution of this Act, shall, if not subject to military law, be guilty of a misdemeanor, and upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than one year, or, if subject to military law, shall be tried by court-martial and suffer such punishment as a court-martial may direct.

SEC. 7. That the qualifications and conditions for voluntary enlistment as herein provided shall be the same as those prescribed by existing law for enlistments in the Regular Army, except that recruits must be between the ages of eighteen and forty years, both inclusive, at the time of their enlistment; and such enlistments shall be for the period of the emergency unless sooner discharged. All enlistments, including those in the Regular Army Reserve, which are in force on the date of the approval of this Act and which would terminate during the emergency shall continue in force during the emergency unless sooner discharged; but nothing herein contained shall be construed to shorten the period of any existing enlistment: *Provided*, That all persons enlisted or drafted under any of the provisions of this Act shall as far as practicable be grouped into units by States and the political subdivisions of the same: *Provided further*, That all persons who have enlisted since April first, nineteen hundred and seventeen, either in the Regular Army or in the National Guard, and all persons who have enlisted in the National Guard since June third, nineteen hundred and sixteen, upon their application, shall be discharged upon the termination of the existing emergency.

The President may provide for the discharge of any or all enlisted men whose status with respect to dependents renders such discharge advisable; and he may also authorize the employment on any active duty of retired enlisted men of the Regular Army, either with their rank on the retired list or in higher enlisted grades, and such retired enlisted men shall receive the full pay and allowances of the grades in which they are actively employed.

of the United States by section eleven of the act approved seventeenth July, eighteen hundred and sixty-two, and for which no rate of compensation has been provided, shall be paid as follows, to wit: Regimental commissary the same as regimental quartermaster; chief trumpeter the same as chief bugler, sad[d]ler-sergeant the same as regimental commissary-sergeant; company commissary-sergeant the same as company quartermaster's sergeant: *Provided*, That the grade of supernumerary second lieutenant, and two teamsters for each company, and one chief farrier and blacksmith for each regiment, as allowed by said section of that act, be, and they are hereby, abolished; and each cavalry company may have two trumpeters, to be paid as buglers; and each regiment shall have one veterinary surgeon, with the rank of a regimental sergeant-major, whose compensation shall be seventy-five dollars per month.

SEC. 38. *And be it further enacted*, That all persons who, in time of war or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial or military commission, and shall, upon conviction, suffer death.

APPROVED, March 3, 1863.

SEC. 8. That the President, by and with the advice and consent of the Senate, is authorized to appoint for the period of the existing emergency such general officers of appropriate grade as may be necessary for duty with brigades, divisions, and higher units in which the forces provided for herein may be organized by the President and general officers of appropriate grade of the several Coast Artillery districts. In so far as such appointments may be made from any of the forces herein provided for, the appointees may be selected irrespective of the grades held by them in such forces. Vacancies in all grade in the Regular Army resulting from the appointment of officers thereof to higher grades in the forces other than the Regular Army herein provided for shall be filled by temporary promotions and appointments in the manner prescribed for filling temporary vacancies by section one hundred and fourteen of the national defense Act approved June third, nineteen hundred and sixteen; and officers appointed under the provisions of this Act to higher grade in the forces other than the Regular Army herein provided for shall not vacate their permanent commissions nor be prejudiced in their relative or lineal standing in the Regular Army.

SEC. 9. That the appointments authorized and made as provided by the second, third, fourth, fifth, sixth, and seventh paragraphs of section one and by section eight of this Act, and the temporary appointments in the Regular Army authorized by the first paragraph of section one of this Act, shall be for the period of the emergency, unless sooner terminated by discharge or otherwise. The President is hereby authorized to discharge any officer from the office held by him under such appointment for any cause which, in the judgment of the President, would promote the public service, and the general commanding any division and higher tactical organization or territorial department is authorized to appoint from time to time military boards of not less than three nor more than five officers of the forces herein provided for to examine into and report upon the capacity, qualification, conduct, and efficiency of any com-

missioned officer within his command other than officers of the Regular Army holding permanent or provisional commissions therein. Each member of such board shall be superior in rank to the officer whose qualifications are to be inquired into, and if the report of such board be adverse to the continuance of any such officer and be approved by the President, such officer shall be discharged from the service at the discretion of the President with one month's pay and allowances.

SEC. 10. That all officers and enlisted men of the forces herein provided for other than the Regular Army shall be in all respects on the same footing as to pay, allowances, and pensions as officers and enlisted men of corresponding grades and length of service *in the Regular Army;* and commencing June one, nineteen hundred and seventeen, and continuing until the termination of the emergency, all enlisted men of the Army of the United States in active service whose base pay does not exceed $21 per month shall receive an increase of $15 per month; those whose base pay is $24, an increase of $12 per month; those whose base pay is $30, $36, or $40, an increase of $8 per month; and those whose base pay is $45 or more, an increase of $6 per month: *Provided,* That the increases of pay herein authorized shall not enter into the computation of the continuous-service pay.

SEC. 11. That all existing restrictions upon the detail, detachment, and employment of officers and enlisted men of the Regular Army are hereby suspended for the period of the present emergency.

SEC. 12. That the President of the United States, as Commander-in-Chief of the Army, is authorized to make such regulations governing the prohibition of alcoholic liquors in or near military camps and to the officers and enlisted men of the Army as he may from time to time deem necessary or advisable: *Provided,* That no person, corporation, partnership, or association shall sell, supply, or have in his or its possession any intoxicating or spirituous liquors at any military station, cantonment, camp, fort, post, officers' or enlisted men's club which is being used at the time for mili-

tary purposes under this Act, but the Secretary of War may make regulations permitting the sale and use of intoxicating liquors for medicinal purposes. It shall be unlawful to sell any intoxicating liquor, including beer, ale, or wine, to any officer or member of the military forces while in uniform, except as herein provided. Any person, corporation, partnership, or association violating the provisions of this section or the regulations made thereunder shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both.

SEC. 13. That the Secretary of War is hereby authorized, empowered, and directed during the present war to do everything by him deemed necessary to suppress and prevent the keeping or setting up of houses of ill fame, brothels, or bawdy houses within such distance as he may deem needful of any military camp, station, fort, post, cantonment, training, or mobilization place, and any person, corporation, partnership, or association receiving or permitting to be received for immoral purposes any person into any place, structure, or building used for the purpose of lewdness, assignation, or prostitution within such distance of said places as may be designated or shall permit any such person to remain for immoral purposes in any such place, structure, or building as aforesaid, or who shall violate any order, rule, or regulation issued to carry out the object and purpose of this section shall, unless otherwise punishable under the Articles of War, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000, or imprisonment for not more than twelve months, or both.

SEC. 14. That all laws and parts of laws in conflict with the provisions of this Act are hereby suspended during the period of this emergency.

APPROVED, May 18, 1917.